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Supreme Court of the United States

October Term, [redacted] 1970

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, *in rem*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION and the ST HESS VOYAGER, *in rem*.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now comes Lykes Bros. Steamship Co., Inc. and respectfully petitions this Honorable Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit on which that court, *standing evenly divided* on rehearing *en banc*, adhered, by operation of law, to its prior judgment of affirmance herein. A motion for certification to this Honorable Court was *"denied since with this Court evenly divided the issues can be as effectively presented by certiorari"*.

(a) Opinions Below.

The opinion of the United States Court of Appeals for the Fifth Circuit on rehearing *en banc*.[1] together with that court's denial of a second rehearing, *en banc*, with oral argument[2] and

[1] Appendix A, *infra*.
[2] Appendix B, *infra*.

of a motion for certification[3] are unreported. The original opinion of that court, Brown, Chief Judge, dissenting, is reported at 417 F. 2d 346, 1969 AMC 1787.[4] The opinion of the trial court, the United States District Court for the Southern District of Alabama, is reported at 285 F. Supp. 412, 1968 AMC 2019.[5]

(b) Jurisdictional Grounds.

(i) The original judgment of the United States Court of Appeals for the Fifth Circuit was rendered on October 10, 1969.

(ii) A rehearing *en banc* was granted by the United States Court of Appeals for the Fifth Circuit on December 15, 1969 and that court, standing evenly divided, ordered its judgment of affirmance adhered to by operation of law on April 28, 1970.

(iii) Motions for a second rehearing, *en banc*, with oral argument and for certification of the questions presented here were denied on June 17, 1970.

(iv) The jurisdiction of this Court is invoked under 28 USC 1254 (1).

(c) Questions Presented for Review.

The Court of Appeals held a rehearing *en banc* and was deadlocked, seven judges for reversal and seven judges for affirmance.

The questions presented by this petition are as follows:

(i) The resolution of the direct conflict between the judgment of the Fifth Circuit here and that of the Court of

[3] Appendix C, *infra*.
[4] Appendix D, *infra*.
[5] Appendix E, *infra*.

Appeals for the Second Circuit in the *GOLDSHELL-WHITE-PLAINS*, 224 F. 2d 86, 1955 AMC 1438, which held that inability to keep steerageway is not an excuse for exceeding moderate speed in fog.

(ii) The resolution of the direct conflict between the judgment of the Fifth Circuit here and that of the Court of Appeals for the Second Circuit in the *BURGEN-BERGECHIEF*, 274 F. 2d 469, 1960 AMC 1380, holding that observation of a target representing another vessel by "use of radar does not justify a failure to obey the rules of navigation generally applicable" in conditions of fog, including Article 16 of the Inland Rules requiring her to stop her engines and then navigate with caution on hearing the fog signal of another vessel directly ahead.

(iii) The need for all important guidance to navigators and lower courts, in cases dealing with collisions in fog and particularly those involving large and unwieldy tank vessels.

(d) Statutes and Regulations Involved.

Inland Rules, Article 16, June 7, 1897, c.4, § 1, 30 Stat. 99, 33 USC 192:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Inland Rules, June 7, 1897, c. 4, § 1, 30 Stat. 100, 33 USC 201:

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

Pilot Rules for Inland Waters, 33 CFR 80.13:

"(a) Moderate speed in fog. (1) Every steam vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"(b) A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

Pilot Rules for Inland Waters, 33 CFR 80.02:

"* * * Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

(c) Statement of the Case

The HESS VOYAGER, a large oil tanker or "super-tanker", was proceeding, in ballast, to Mobile, Alabama on March 3, 1966. Dense fog existed in the City of Mobile, its harbor and bay during the entire day, to the knowledge of her pilot. The HESS VOYAGER proceeded up the Mobile Bay Ship Channel and, by radar, located the downbound CHARLES LYKES at a distance of 2 miles. The CHARLES LYKES was observed to be on the same side of the channel as the HESS VOYAGER and, from the radar observations of the HESS

VOYAGER's master, remained there until the collision occurred. The HESS VOYAGER despite the known presence of the CHARLES LYKES, directly ahead of her and in her path, continued to proceed at 7½ knots through the water to the moment of collision. The fog at the time was so dense that the HESS VOYAGER could not sight a vessel more than 300 feet beyond her bow.

The HESS VOYAGER, while continuing to operate at this grossly immoderate speed, did not stop her engine on hearing the fog signal of the CHARLES LYKES forward of her beam. No steps were taken by the HESS VOYAGER to avoid the collision until the CHARLES LYKES broke out of the fog, 300 feet away, at which point the collision was inevitable.

The foregoing took place in the Mobile Bay Ship Channel just below the entrance to the port of Mobile. Navigation of a supertanker such as the HESS VOYAGER in this manner and under these conditions in such proximity to a metropolitan area patently gives rise to a tremendous risk of utter catastrophe through its potential for explosion or pollution. The Court of Appeals for the Fifth Circuit, through its inability to resolve the issues presented, having been deadlocked on rehearing, *en banc*, has served to affirm the decision below absolving the HESS VOYAGER from these obvious major faults:

(i) Proceeding at grossly excessive speed to the moment of collision in dense fog, although apprised that the other vessel was dead ahead of her;

(ii) Failing to stop her engine and then to navigate with caution on hearing the fog signal of another vessel ahead of her beam in dense fog; and

(iii) Accepting a radar observation of another vessel dead ahead as sufficient "ascertainment" to excuse compliance with the rules governing navigation in fog.

(f) Basis for Federal Jurisdiction.

The jurisdiction of the District Court is based on the admiralty and maritime jurisdiction of the United States, United States Constitution, Article 3, §2, 28 USC 1333.

(g) Reasons for Allowance of the Writ.

The objective of the navigation rules, which have been ignored by the Court of Appeals in this case, is set forth by the outstanding authority on American law of collision, Griffin on Collision (New York, 1949), p. 27, as follows:

> "It is obvious that rules, to be of any value must be enforced rigidly. 'The safety of navigation depends essentially upon *the certainty, which results from exact adhesion to general and well-known regulations*' (the *Emma Kate Ross*, 41 Fed. 826, 838 [1890]). * * *"

The departure from that certainty which is so plainly required if any degree of safety of navigation is to be obtained, is all the more incomprehensible when it is appreciated that the HESS VOYAGER is an oil carrying supertanker. The City of Mobile, through her navigation was subjected to a disaster by pollution or explosion of the magnitude of the TORREY CANYON or of Texas City. In an era in which safety of life at sea and the preservation of our ecology are of such prime importance, it is unthinkable that a court having responsibility for the enforcement of the navigation rules could countenance the actions of the HESS VOYAGER—yet this is precisely what the Fifth Circuit has done. This was pointed out by the dissent of Chief Judge Brown:

"* * * Rule 16 is now dead in the Fifth Circuit. * * * The decision obliterates the two mandatory imperatives of Rule 16—(1) moderate speed and (2) stopping engines.* * *

"* * * On this opinion navigators will know that breaching the moderate speed Rule-of-Sight is a mere technical violation.

"* * * As the judge-approved justification for ignoring the second mandate of Rule 16—stopping engines on hearing fog signal—the court gives its blessing to a vessel plowing right on in the fog toward a ship known to be in its path. * * *

"Considering the size of this vessel, one of the contemporary huge tankers of ever increasing size, to allow such speed, which does not even begin to pay even a deferential bow toward Rule 16, the court's action is nothing more than to write out Rule 16. It is to give judicial license to bigness, as though the ungainly, awkward nature of these floating boxes relieves them of compliance with any part of the rules except the qualifiers of 'special circumstances', 'existing circumstances', and the like. And, since on this Court's analysis S/T HESS VOYAGER could never safely navigate in channels or harbors at a speed less than 6 knots, it means that for her life, she need not pay heed to Rule 16 and its demand for moderate speed which, until today, has always meant capacity to stop in half the distance of visibility. * * * "

(i) The HESS VOYAGER was Guilty of Immoderate Speed.

Article 16 of the Inland Rules, 33 USC 192, requires that vessels, in fog, shall "go at a moderate speed, having careful regard for the existing circumstances and conditions". The "circumstances and conditions" are those inherent in the locale,

weather and visibility which affect the scene of collision, *The NORMANDIE*, 43 Fed. 151 (DC, NY, 1890). They do not excuse and they cannot be interpreted to excuse the immoderate speed of a vessel on the theory that she has been so constructed as to be incapable of operating at a moderate speed, *The EAGLE POINT*, 120 Fed. 449 (CA, 3, 1903); *The SAGAMORE*, 247 Fed. 743 (CA, 1, 1917).

The rule was stated by this Court that "big vessels may not insolently disregard smaller ones; super-size gives no right to domineer", *Wilson vs. Pacific Mail Steamship Co.*, 276 US 454, 72 L. Ed. 651, 48 S. Ct. 369 (1920). See also *Lewis vs. Jones*, 27 F. 2d 72, (CA, 4, 1938), cert. den. 278 US 634, 73 L. Ed. 551, 49 S. Ct. 32; *The DELTSCHLAND*, 129 Fed. 964 (DC, NY, 1904) aff. 137 Fed. 1018; *New York Central Railroad Company vs. Texaco, Inc.*, 226 F. Supp. 140 (DC, NY, 1964).

The landmark decision of this Court in *The PENNSYLVANIA*, 19 Wall. (86 US) 125, 134, 22 L. Ed. 148 (1873), deals with facts and is couched in language which are squarely on point here:

> "* * * And even if it were true that such a rate (seven knots) was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to. * * *"

Apart from the plain dictates of the decisions of this Court, the opinion of the Fifth Circuit directly conflicts with that of the Second Circuit in the *GOLDSHELL-WHITE PLANS*, 224 F. 2d 86, 1955 AMC 1438, holding:

> "The Goldshell has moved for a rehearing because of testimony in that part of the record that was not printed and that we therefore did not have before us; i.e., that *she was moving only as fast as was necessary to keep steerageway. Though we were to accept this as true, it would not be an excuse for exceeding 'moderate speed' as we defined it in our original opinion: the command is imperative.* * * * At any rate we have so often held that *inability to keep steerageway is not an excuse*, that we shall adhere to that interpretation, until the Supreme Court corrects our mistake, if it is one." (Footnote omitted and emphasis added.)

The foregoing decision cannot be reconciled with that of the court here which held that the speed of the HESS VOYAGER was excused "because of the great size of the vessel, its length approaching twice the width of the channel" and "as a result, any reduction in speed would have seriously impaired the pilot's ability to control the vessel."

The rule of this Court and of the Second Circuit, so plainly ignored by the Fifth Circuit in this case, has been codified in the International Rules, 33 USC 1094(2), as follows:

> "A vessel navigating with the aid of radar in restricted visibility must, in compliance with Section 1077 (a) of this title, go at a moderate speed. * * * *Radar indications of one or more vessels in the vicinity may mean that 'moderate speed' should be slower than a mariner without radar might consider moderate in the circumstances.*" (Emphasis added.)

Although the International Rules do not apply here, certainly "they reflect the standard of care [in their navigation] required of ships having radar". *Standard Oil Company of California vs. SS ROTTI*, 286 F. Supp. 677, 1968 AMC 1992

(ND, Cal.), aff. 398 F. 2d 835, 1968 AMC 1991; cert. den. 393 US 980, 21 L. Ed. 2d 441.

The majority opinion of the Fifth Circuit pointed out that the HESS VOYAGER "was making approximately 6 knots an hour while stemming an ebbtide of one and one-half knots"; *a relevant speed of seven and one-half knots through the water*, the common medium in which the vessels were navigating[6] and this speed was maintained *"in a heavy fog which restricted the vessels from visual sightings of each other until they were approximately three hundred feet apart."*

The action of the court, in excusing this plain fault, cannot be reconciled, in any manner, with the prior decisions of this Court or of the Second Circuit. It plainly is wrong and is an open invitation to disaster if allowed to stand. We submit that this is one of those instances, however rare, when it is essential that this Court speak for the guidance of both the courts below and the navigators who must take their instructions from their decisions.

(ii) The HESS VOYAGER'S Radar Observations Did Not Excuse Her Failure to Comply with the Fog Rules.

The HESS VOYAGER, unable to see a vessel more than 300 feet forward of her bow, observed, by radar and at a distance of 2 miles, that the CHARLES LYKES was dead ahead and was approaching her on the same side of the channel. The CHARLES LYKES remained in this relative position, dead

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[6] This is the relevant speed. *O/Y Finlayson-Forssa vs. Pan Atlantic S. S. Corp.*, 259 F. 2d 11, 1958 AMC 2070 (CA, 5), cert. den. 361 US 882, 4 L. Ed. 2d 119, 80 S. Ct. 153; *The GOLDSHELL WHITE PLAINS*, 224 F. 2d 86, 1955 AMC 1438 (CA, 2)

ahead, while the vessels closed the 2 mile distance between them.

Article 16 of the Inland Rules requires that vessels, in fog, stop their engines and then navigate with caution on hearing the fog signal of another forward of the beam, the position of which cannot be "ascertained" by reason of the fog. The Fifth Circuit here, however, held that the radar observation by the HESS VOYAGER of the CHARLES LYKES, directly in its path, excused the HESS VOYAGER from compliance with Article 16. In discussing this the court, referring to the radar observations by the HESS VOYAGER, held:

> "The second condition requires that the position of the signaling vessel be unknown. Here the evidence clearly indicates that the HESS VOYAGER at all times knew the position of the CHARLES LYKES. * * * "

This decision of the Fifth Circuit is in direct conflict with that of the Second Circuit which held, in the *BURGEN-BERGEDIEF*, 274 F. 2d 469, 1960 AMC 1380, that the "use of radar does not justify a failure to obey the rules of navigation generally applicable". This rule again is one which has been specifically incorporated in the International Rules, 33 USC 1094(3):

> "When navigating in restricted visibility the radar range and bearing alone do not constitute ascertainment of the position of the other vessel under section 1077 (b) of this title sufficiently to relieve a vessel of the duty to stop her engines and navigate with caution when a fog signal is heard forward of the beam."

Once more there is a direct conflict between the circuits on one of the principal rules governing navigation in fog, the

very condition which leads to the vast majority of our maritime casualties.

(iii) The Necessity for a Precedent to Guide Navigators and Courts.

The affirmance, by operation of law, through the evenly divided court when the case was before the court on rehearing *en banc*, leaves the Fifth Circuit diametrically opposed to the Second Circuit.

The decisional law of the Supreme Court and of the Courts of Appeals does not merely furnish precedents for the lower courts but, most importantly, provides guidance for the navigators who are required to govern their conduct by the Rules as interpreted by the courts. In Farwell, *The Rules of the Nautical Road* (Rev. Ed., 1954), the author's preface states:

> "As teacher and practical mariner of some experience, the writer believes that a clear, definite, positive knowledge of the principles here presented should be an essential part of the professional equipment of every man on the bridge engaging in the practice of navigation. Court decisions in an overwhelming number prove that nearly all marine collisions follow violations of the rules of the road. *The inference is that the rules, if implicitly obeyed, are practically collision-proof. It is the writer's opinion that most of this seemingly disregard of the law is due to misunderstanding of the rules as interpreted by the courts. The rules will not be better obeyed until they are better understood.* Such a better understanding by the mariner is the primary purpose of this book." (Emphasis added)

There is no understanding of Rule 16 possible when there exists this conflict between the circuits as to the basic

requirements of moderate speed, ascertainment of location and stopping of engines. We submit that there is the most urgent need for clarification by this Court.

(h) Conclusion.

The judgment affirmed by the Fifth Circuit here clearly is wrong and directly conflicts with the decisions of the Second Circuit. The areas involved—the requirement of moderate speed, stopping of engines and navigating with caution in fog—are of the greatest importance to the lower courts and to navigators whose conduct is dependent upon the judicial interpretation of the rules.

Your petitioner accordingly prays that a writ of certiorari be granted to review the decision of the Court of Appeals for the Fifth Circuit in this case in order that the conflict existing between the circuits may be resolved.

Respectfully submitted,

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PILLANS, REAMS, TAPPAN, WOOD & ROBERTS.

CERTIFICATE

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing application to respondents' counsel of record, T. K. Jackson, Esq., by mailing a copy thereof, postage prepaid, to him at his office at Mobile, Alabama, on this day of July, 1970.

BENJAMIN W. YANCEY

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

LYKES BROS. STEAMSHIP CO., INC.,
Plaintiff-Appellant,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Alabama

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(April 28, 1970)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, and INGRAHAM, Circuit Judges.

BY THE COURT: On rehearing of this case en banc the court stands evenly divided, therefore judgment of affirmance is adhered to by operation of law.

APPENDIX B.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

LYKES BROS. STEAMSHIP CO., INC.,
Plaintiff-Appellant,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING EN BANC
OF THE EN BANC DECISION

(June 17, 1970)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, and INGRAHAM, Circuit Judges.

PER CURIAM:

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on the Petition for Rehearing of the En Banc decision (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for such Rehearing En Banc with oral argument is DENIED.

APPENDIX C.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

MOTION FOR CERTIFICATION TO THE
UNITED STATES SUPREME COURT.

(June 17, 1970)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON,

MORGAN, CLARK, and INGRAHAM, Circuit Judges.

PER CURIAM:

The Appellant's Motion for Certification to the United States Supreme Court is denied since with this Court evenly divided the issues can be as effectively presented by certiorari.

DENIED.

APPENDIX D.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

LYKES BROS. STEAMSHIP CO., INC.,
Plaintiff-Appellant,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Alabama

(October 10, 1969)

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

CABOT, District Judge: This is an appeal from an interlocutory decree holding Lykes Bros. Steamship Co., the appellant, solely at fault for the collision between its ship, The SS Charles Lykes, and the ST Hess Voyager owned by the Hess Shipping Corp., the appellee. Each party had sued the other and its vessel. The actions were consolidated for a non-jury trial limited to the issue of liability. The appellant Lykes asserts that the findings of fact and the conclusions of law, insofar as the latter relate to Hess's freedom from fault, are clearly erroneous.

The facts indicate that on the night of March 3, 1966, in the Upper Reach of Mobile Bay Channel, the outward-bound SS Charles Lykes and the inward-bound Hess Voyager collided at a point adjacent to buoy No. 42 and, as the lower court found, in the eastern portion of the channel.

The channel runs nearly due north and south and is 40 feet in depth for a width of 400 feet. Because the sides of the channel are sloped, it is possible for vessels drawing less than 40 feet to navigate outside the channel boundaries.

The collision occurred in a heavy fog which restricted the vessels from visual sightings of each other until they were approximately 300 feet apart. Two buoys are relevant to this discussion. Both are on the eastern side of the channel approximately 150 feet east of the channel boundary line, with buoy No. 44 being about one nautical mile to the north of buoy No. 42.

On the day of the collision, the Charles Lykes, (a C-2 type cargo vessel, 441 feet long and 63 feet wide, gross tonnage 8,178) departed the Alabama State Dock at about 9:00 P.M. under the control of her master, Capt. Beasley, and pilot, Capt. Walsh. The vessel steamed a course of 154 degrees through the inner harbor of Mobile Bay, also known as Pinto Reach, to its juncture with the Upper Reach which is marked by buoy No. 44. At this point the vessel was to turn to 182 degrees, the necessary coordinate for an outward-bound vessel. At the time, the pilot of the Charles Lykes was trying to follow the Claiborne, a vessel which had preceded it out of the harbor and which successfully executed the customary port to port pass with the Hess Voyager. However, upon negotiating the turn a problem developed. Although the Charles Lykes was equipped with radar, its unit did not indicate the existence of objects off either the port bow or dead ahead of the vessel. The lower court determined that this failure was caused by the negligent rigging and fixing of cargo booms at a height in excess of and thus in interference with the radar equipment. This interference prevented the Charles Lykes from picking up buoy No. 44 which resulted in a delay of its turn into the upper Reach Channel and further prevented it, upon its turn, from either tracking the course of the Claiborne or from picking up the Hess Voyager on its radar. The lower court concluded that because of these difficulties the Charles Lykes ended up in the eastern side of the channel.

The Hess Voyager, under her master, Capt. Castro, took on a pilot, Capt. Raley, about 30 miles from the site of the collision. At that point visibility was about four miles. However, fog was encountered when the Voyager reached a point about half way up the channel. Capt. Raley notified the Charles Lykes's pilot of the weather conditions and reduced speed to slow ahead.

Throughout this period the radar unit on the Hess Voyager was operating properly and was providing a view of all channel markers and other vessels. The Hess Voyager on at least one subsequent occasion warned the Charles Lykes by radio that the Charles Lykes was too far to the east and would have to move over to effect a safe passing. As the Hess Voyager approached buoy No. 42 prior to the collision, she was making approximately six knots an hour while stemming an ebb tide of 1½ knots, the wind blowing from the southwest at eight to twelve miles per hour. The Voyager maintained a course on the extreme eastern side of the channel, as the lower court found.

By the time both vessels reached buoy No. 42 and made visual sightings of each other, it was too late to avoid collision. The Charles Lykes went to full ahead and hard right rudder and the Hess Voyager to full astern and hard right. The Hess Voyager went aground just at or immediately after the collision. The vessels collided port to port and the Charles Lykes let out its anchors, finally stopping afloat with her bow facing northwest.

The lower court concluded that the Charles Lykes was guilty of gross negligence in rigging her booms in such a way as to greatly impair the effective use of her radar and was grossly at fault in failing to maintain a course on her own starboard side of the channel in violation of Article 25 of the Inland Rules, 33 U.S.C. § 210. It also concluded that any violations on the part of the Hess Voyager of Article 16 of the Inland Rules, 33 U.S.C. § 192, were technical in nature and could not be construed as a contributing cause of the collision.

Rule 52(a), Fed. R. Civ. P., applies in admiralty cases and the trial court's findings must be affirmed unless clearly

erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525 (1948). This is not such a case.

Appellant argues that the court erred in failing to conclude that the Hess Voyager was at fault for operating at excessive speed in dense fog, for failing to stop her engines on hearing the fog signal of the Charles Lykes, and for failing to take any steps to avoid the collision. Article 16, of the Inland Rules, 33 U.S.C. §192, states:

> Every vessel shall in a fog . . . go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel *hearing* apparently forward of her beam, the fog signal of a vessel, *the position of which is not ascertained*, . . shall, *so far as the circumstances of the case admit*, stop her engines, and then navigate with caution until danger of collision is over. [Emphasis added.]

The standard of moderate speed as set forth in the statute is necessarily vague. Moderate speed, while less than full speed, is a relative term which depends upon the particular circumstances of each case. *Polarus S/S Co. v. T/S Sandefjord*, 236 F.2d 270 (2 Cir. 1956). This court long ago recognized that:

> Moderate speed is purely a relative term, which means no more than that the vessel must run at a prudent rate of speed. Time, place, and circumstance, rather than the swiftness of the vessel over her course, determine whether

the actual speed was immoderate, in that it was imprudent. *Quinette v. Bisso*, 136 F. 825, 830 (5 Cir. 1905).

Under the circumstances of this case the trial court was correct in concluding that the Hess Voyager was not operating at an immoderate speed. The Hess Voyager is a large tanker built in 1964, with a length of 708.2 feet, a beam of 102.4 feet, and gross tonnage of 27,015 tons. The testimony indicated that at full ahead she would make 17 knots and that at slow ahead she would make approximately four knots. The pilot estimated the current at 1½ knots and the speed at five or six knots over the ground. Whether a court recognizes the "Bare Steerage Rule," i.e., that "speed should be reduced to the lowest point consistent with good steerage," *Skibs A/S Siljestad v. S/S Mathew Luckenbach*, 215 F.Supp. 667, 679 (S.D. N.Y. 1963) or the "Rule of Sight," i.e., "the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility." *O/Y Finlayson-Forssa A/B v. Pan Atlantic S/S Corp.*, 259 F.2d 11, 20 (5 Cir. 1958), both of which are tempered by and subject to analysis under the existing circumstances, *Polarus S/S Co. v. T/S Sandefjord*, supra, the conclusion is inescapable that because of the great size of the vessel, its length approaching twice the width of the channel, the direction and force of the wind, and its maintaining a course on the extreme eastern portion of the channel, the speed of the Voyager was not immoderate. It was prudent and moderate. The facts support and justify a conclusion that any reduction in speed would have seriously impaired the pilot's ability to control the vessel, which might have resulted in a more serious accident than that which occurred. See, *Cities Service Oil Co. v. M/V Melvin H. Baker*, 260 F. Supp. 244 (E.D. Pa. 1966). A reduction in speed would have been unreasonable and incon-

sistent with the rules of navigational safety. The district court did not err in concluding that the speed of the Hess Voyager was moderate.

Moreover, the district court did not err in concluding that the Hess Voyager did not contribute to the cause of the collision by failing to stop its own engines in violation of § 192.

Section 192 contains three prerequisites, all of which must be met before an affirmative duty is placed upon a steam vessel to stop her engines. First, the vessel must hear, apparently forward of her beam, the fog signal of the other vessel. This point is in conflict, but even if a finding is made that the Charles Lykes's signal was heard by the Hess Voyager, the other two conditions must be determined in favor of Hess, as we shall see.

The second condition requires that the position of the signaling vessel be unknown. Here the evidence clearly indicates that the Hess Voyager at all times knew the position of the Charles Lykes. In fact, as previously stated, the Hess Voyager on at least two occasions informed the Charles Lykes of her position and requested her to move over to starboard, requests which she acknowledged.

As to the third condition, the existing circumstances would not permit the Hess Voyager to stop her engines and then navigate with caution. This is so, for given the size of the Hess Voyager, the width of the channel, and the force and direction of the wind, stopping her engines would in all probability have resulted in her drifting crossways in the channel or partially blocking it, thus increasing the danger to other vessels in the area and the probability of a more serious collision

with the Charles Lykes. The wording of the statute is itself a patent recognition that stopping of the engines may be at odds with further "navigation with caution." This case is illustrative of that point. The lower court did not err in its conclusion that the Hess Voyager was without fault with regard to these points.

The appellant also attacks as clearly erroneous the trial court's determination of the position of the vessels prior to the collision. Here the appellant relies upon the interpretation of a course recorder which revealed a course which would have placed the Hess Voyager in the western portion of the channel at the time of the collision. However, as one court has so ably said:

> It [a course recorder], is not an infallible instrument. When considered in light of . . . disinterested witnesses . . . we believe it to be a reasonable inference to conclude that the course recorder did not reflect the true course, *Hess Tankship Co. v. SS M. L. Gosney*, 230 F. Supp. 1, 6 (E.D. Va. 1963).

In support of the finding of the trial court that the Hess Voyager was in the eastern portion of the channel, the testimony of several individuals is important. First, there is the testimony of Capt. Staggers of the Claiborne. He testified that when the Hess Voyager passed his vessel the Voyager was on the starboard (eastern) side of the channel, and that when the colliding vessels converged the Charles Lykes was in the center of the channel, or else to the east of the centerline. The record also reflects that upon notice from Capt. Raley, pilot of the

Hess Voyager, that the Charles Lykes was in the eastern portion of the channel; Capt. Walsh, pilot of the Charles Lykes reported to Capt. Raley that he was moving over, and the Charles Lykes did change its course, but not far enough to avoid the collision. Finally, here is the objective fact that at or immediately after the moment of impact the Hess Voyager went aground far to the east of the center line of the channel.

A revue of the entire evidence leaves this court with the definite and firm conviction that the district court did not err in determining that: (1) the Hess Voyager did not violate Article 25 of the Inland Rules, 33 U.S.C. § 210, in that she maintained a course to her own starboard side; (2) any violations of Article 16 of the Inland Rules, 33 U. S. C. § 192, by the Hess Voyager were technical in nature and were not a contributing cause of the collision; (3) the Hess Voyager did not otherwise contribute to the cause of the collision. The judgment of the district court is, therefore, AFFIRMED.

BROWN, Chief Judge, dissenting:

To express strong disagreement with the Court's decision I need not consider the record as I might perhaps read it. I just use the Court's characterization of the facts to demonstrate that Rule 16[1] is now dead in the Fifth Circuit except perhaps those portions which refer to "existing circumstances" or "so far as the circumstances of the case admit." Magnifying these quali-

[1] Article 16 of the Inland Rules, 33 U.S.C. § 192:

"Every vessel shall in a fog . . . go at a moderate speed having careful regard to the existing circumstances and conditions.

A steam vessel hearing apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

fiers the decision obliterates the two mandatory imperatives of Rule 16—(1) moderate speed and (2) stopping engines. The Court treats it as just a floating intersectional automobile collision in which the fact finder can look back and see what prudent people would have done.

But the genius of the Rules for Prevention of Collision is their certainty. Thus a red light means for one vessel to hold course and speed, the other to give way. In an overtaking the overtaken vessel must hold course and not cross or crowd upon the course of the overtaking ship. In crossing, the vessel having the other vessel on her starboard shall keep out of the way of the privileged ship.

But on this opinion navigators will know that breaching the moderate speed Rule-of-sight is a mere technical violation.[2]

But it is hardly a technical violation when not only the risk of collision, but collision itself occurred because both vessels continued on ahead, continuously closing the interval between them. A result so plain in fact cannot be glossed over by the metaphysical dialectic of proximate cause.

More than that, this was a collision which should never have occurred. Although with defective radar she could not "see" S/T Hess Voyager, the descending S/S Charles Lykes knew of her presence. Worse, as the judge-approved justification for ignoring the second mandate of Rule 16—stopping engines

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[2]With obvious approval the Court paraphrases the trial court's conclusion: "It also concluded that any violation on the part of the Hess Voyager of Article 16 of the Inland Rules, 33 U.S.C. §192, were technical in nature and could not be construed as a contributing cause of the collision." . . . F.2d . . . .

on hearing fog signal—the Court gives its blessing to a vessel ploughing right on in the fog toward a ship known to be in its path. This is what we say: "The second condition requires that the position of the signaling vessel be unknown. Here the evidence clearly indicates that the Hess Voyager at all times knew the position of the Charles Lykes. In fact, as previously stated, the Hess Voyager on at least two occasions informed the Charles Lykes of her position and requested her to move over to starboard, requests which she acknowledged." . . . F.2d . . .

Earlier, the court phrased it this way: "Throughout this period the radar unit on the Hess Voyager was operating properly and was providing a view of all channel markers and other vessels. The Hess Voyager on at least one subsequent occasion warned the Charles Lykes by radio that the Charles Lykes was too far to the east and would have to move over to effect a safe passing." . . . F.2d. . .

In a restricted channel of 400 feet[3] in "a heavy fog which restricted the vessels from visual sightings of each other until they were approximately 300 feet apart." . . . F.2d. . . S/T Hess Voyager "was making approximately six knots an hour while stemming an ebb tide of 1½ knots."[4] . . . F.2d . . .

At this speed she was making 600 feet per minute, a distance double that of her visibility and four times the half of visible distance. So gross was this *im*moderate speed that her

[3] "The channel runs nearly due north and south and is 40 feet in depth for a width of 400 feet. Because the sides of the channel are sloped; it is possible for vessels drawing less than 40 feet to navigate outside the channel boundaries." . . . . F .2d . . . .

[4] With each vessel floating and underweigh the tide is irrelevant with respect to the positions of the vessels relative to each other, not fixed objects.

knowledgeable counsel did not even undertake to prove, by experiments, tests, expert witnesses, or otherwise just what time it would take from 6 knots ahead to dead stop or the distance S/T Hess Voyager would run in that maneuver. It is plain to everyone who knows anything of vessel operation that she could not stop in one half a minute—300 feet—and certainly not in one half the visibility, a quarter of a minute in 150 feet.

Considering the size of this vessel, one of the contemporary huge tankers of ever increasing size,[5] to allow such speed, which does not even begin to pay even a deferential bow toward Rule 16, the Court's action is more than to write out Rule 16. It is to give judicial license to bigness, as though the ungainly, awkward nature of these floating boxes relieves them of compliance with any part of the rules except the qualifiers of "special circumstances", "existing circumstances", and the like. And, since on this Court's analysis S/T Hess Voyager could never safely navigate in channels or harbors at a speed less than 6 knots, it means that for her life, she need not pay heed to Rule 16 and its demand for moderate speed which, until today, has always meant capacity to stop in half the distance of visibility. *O/Y Finlayson-Forssa A/B v. Pan Atlantic S/S Corp.*, 5 Cir. 1958, 259 F.2d 11, 20, 1958 A.M.C. 2070, cert. denied, 1959, 361 U.S. 882, 80 S.Ct. 153, 4 L.Ed.2d 119. Nor will she suffer the burden imposed on smaller craft of the rule of *The Pennsylvania*, 1873, 86 U.S. 125, 19 Wall. 125, 22 L. Ed. 148, that a violation must establish not only that the breach did not, but could not, have caused the collision. Tempered occasionally by notions of major—minor fault, last clear chance, etc., this stringent demand still prevails, expecially, until today, in fog

[5] The Hess Voyager is a large tanker built in 1964, with a length of 708.2 feet, a beam of 102.4 feet, and gross tonnage of 27,015 tons.

cases. *Finlayson-Forssa A/B vs. Pan Atlantic S/S Corp.*, 259 F.2d at 22.

It will be interesting to see what we will do with the next fog case in which two ocean going vessels capable from smaller size of reducing speed safely to the Rule-of-sight seek absolution for flagrant breach by incanting our *S/T Hess Voyager*.[6]

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[6]It is incongruous that Congress in its then technical ignorance of all modern scientific marvels such as radar and ship-to-ship radio, put store on signals, ability to see and peremptory commands. The fact is that neither ship was navigating by the Rules. These were junked for radar. And one, with full knowledge of the other's position charged headlong into certain collision. Compliance with the Rule would have avoided it.

APPENDIX E.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 4340-66

HESS SHIPPING CORPORATION,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,

Civil Action No. 4341-66

LYKES BROS. STEAMSHIP CO., INC.,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem.

OPINION

This consolidated litigation arises out of a collision between the SS CHARLES LYKES and the ST HESS VOYAGER which occurred on the night of March 3, 1966, at

approximately 2210 hours in the Upper Reach of Mobile Bay Ship Channel near Buoy No. 42, about one mile south of the mouth of the Mobile River.

Hess Shipping Corporation as owner and operator of the ST HESS VOYAGER filed suit for its damages against Lykes Brothers Steamship Co., Inc. as owner and operator of the SS CHARLES LYKES and against the SS CHARLES LYKES in rem, and Lykes Brothers Steamship Co., Inc. likewise filed suit for its damages against Hess Shipping Corporation and the ST HESS VOYAGER. The suits were consolidated for trial and it was stipulated that the cases would be tried on the issues of liability and that the damages would be determined in subsequent proceedings, if necessary.

The CHARLES LYKES is a C-2 type cargo vessel, 441 feet long, 63 feet wide and with a gross tonnage of 8,178 tons. The HESS VOYAGER is a large tanker, 708 feet in length, 102 feet wide and a gross tonnage of 27,015 tons. Both vessels were propelled by single screw steam turbine engines. The HESS VOYAGER was inbound to the Port of Mobile from sea; the CHARLES LYKES was outbound from Mobile to Pascagoula, Mississippi, a relatively short run from Mobile. Both vessels were light.

The vessels were under the conn of Mobile Bar Pilots. When the pilot of the HESS VOYAGER boarded that vessel at the sea buoy, about 30 miles from the scene of the collision, visibility was good, being about four miles. When the pilot of the CHARLES LYKES boarded his vessel at the Alabama State Docks, approximately three and one-half miles from the scene of the collision, visibility was restricted but was believed to be clearing in that immediate area. Near Beacon No. 28, approxi-

mately one-half the way up the channel, the HESS VOYAGER encountered thick fog. Pilots of the Mobile Bar Pilots Association are equipped with walkie-talkie radios. The pilot of the CHARLES LYKES, before leaving the dock, communicated by voice radio with the pilot of the HESS VOYAGER and was advised by the latter that the HESS VOYAGER was encountering thick fog in the vicinity of Beacon No. 30, about five miles from the scene of the collision. However, the pilot of the CHARLES LYKES did not suggest to the vessel's master that the vessel's departure be delayed for a short while in order to avoid meeting and passing the HESS VOYAGER in fog in the narrowest part of the channel.

The collision occurred in the northern portion of the Upper Reach of Mobile Bay Ship Channel. It is necessary to describe the physical characteristics of this portion of the channel in order to visualize the events leading up to the collision. The channel is 40 feet in depth for a width of 400 feet. Because the sides of the channel are sloped it is possible for vessels drawing less than 40 feet to navigate slightly outside the 400 foot boundaries. On either side of the dredged area are spoil banks covered by three or four feet of water. The channel runs nearly due north and south. There are but two navigational aids, Buoy No. 44 and Buoy No. 42, in this portion of the channel and both are located on the eastern side of the channel and are approximately 150 feet eastward of the 400 foot eastern boundary line.

Both vessels were equipped with radar sets. The CHARLES LYKES radar could not be properly operated or relied upon because of the manner in which the booms and their related equipment had been rigged. When the vessel sailed the booms had been left in an upright position rather than being lowered

and seated in cradles. The antenna or scanner of the radar was installed on the starboard side of the midshiphouse and did not extend upward as high as the booms in their upright position. This faulty rigging of the booms prevented the radar from detecting targets dead ahead and off the port bow of the vessel and this in turn resulted in the failure of the radar to detect the HESS VOYAGER or the channel markers located on her port side. Conversely, the radar on the HESS VOYAGER was operating properly and was providing its operators with a view of all the channel markers and other vessels.

When fog was encountered the HESS VOYAGER reduced speed to Slow Ahead and commenced sounding fog signals. She met and passed, port to port, several other vessels, including two steamships, without incident. Because of her length, nearly double the width of the channel, she did not consider it prudent to anchor, as this maneuver might have resulted in her blocking the entire channel. Her first radar observation of the CHARLES LYKES came when the vessels were nearly two miles apart. Because the CHARLES LYKES appeared on the radar to be too close to the eastern side of the channel the HESS VOYAGER inquired over the radio if the CHARLES LYKES was equipped with radar and received an affirmative response. When the vessels were one and one-half miles apart the pilot of the HESS VOYAGER again contacted the pilot of the CHARLES LYKES and requested the latter to move over to his own starboard side of the channel so the vessels would clear port to port. This was answered by the pilot of the CHARLES LYKES to the effect that he was in the process of moving over. When the vessels were approximately one-half mile apart, a similar request was made by the pilot of the HESS VOYAGER and the same response as before was received from the CHARLES LYKES.

When the vessels were visually sighted by each other, their bows were only 300 feet apart. They were very nearly head to head; the CHARLES LYKES went in quick succession from Slow Ahead to Half Ahead to Full Ahead on a hard right rudder; the HESS VOYAGER went Full Astern on a right rudder and was aground at the moment of collision. Initial contact was near the bow on the port side of each vessel.

Not surprisingly, the bone of contention consisted of charges by each vessel that the other was on the wrong side of the channel. A preponderance of the more credible evidence shows clearly that the CHARLES LYKES was on the wrong side of the channel. In an effort to avoid the on-coming CHARLES LYKES, the HESS VOYAGER grounded at the moment of collision on the eastern extremity of the channel. She was so far out of the channel that the tug that came to pull her free also went aground. Shortly before the collision, a disinterested witness, the master of the SS. Claiborne, made a radar observation of the position of the CHARLES LYKES in the channel; his observation placed her well over on the eastern side of the channel.

The CHARLES LYKES charges that the HESS VOYAGER was in violation of Article 16 of the Inland Rules in failing to stop her engines on hearing a fog signal forward of her beam and in failing to navigate so as to have been able to stop within one-half the range of visibility. By including the clause, "so far as the circumstances of the case admit", Article 16 recognizes that literal compliance with its terms is not applicable in every instance. Considering the narrowness of the channel, the size of the vessel and the weather conditions, the HESS VOYAGER was justified in not stopping her engines or attempting to anchor. The question of whether or not she could have stopped

her headway by use of her own engines within one-half the range of visibility is not applicable here for it is apparent from all of the evidence that the HESS VOYAGER was aground at the moment of collision and that the CHARLES LYKES would have collided with her even if she had been dead in the water.

The foregoing shall constitute the court's Findings of Fact.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the subject matter and of the parties to these consolidated suits.

2. The CHARLES LYKES was guilty of gross negligence in rigging her booms in such a way as to greatly impair the effective use of her radar. *Continental Oil Co. v. The M/V Glenville*, (S.D. Tex. 1962) 210 F. Supp. 865, 1962 A. M. C. 2311; *The Medford*, (E. D. N. Y.) 65 F. Supp. 622, 1946 A. M. C. 795; *The T.J. Hooper*, 60 F. (2nd) 737, 1931 A. M. C. 1764.

The CHARLES LYKES was grossly at fault in failing to maintain a course on her own starboard side of the channel. Inland Rules, Article 25, 33 U.S.C. 210. *The Standella* (CA5) 103 F. (2nd) 619, 1940 A. M. C. 286; *The Union Reliance*, (S.D. Tex. 1963) 222 F. Supp. 874, 882, 1965 A.M.C. 901, 914.

Any violations of Article 16 of the Inland Rules, 33 U. S. C. 192, on the part of the HESS VOYAGER were technical in nature and cannot be construed as a contributing cause of the collision. *The Standella, Supra; Compania de Madras v Queenston Heights*, (CA5) 220 F. (2nd) 120, 1955 A.M.C. 797; *Whitestack Towing Corp. v. Bethlehem Steel Co.* (CA4) 279 F.

(2nd) 419, 1960 A.M.C. 2294; *Universal Ins. v. The Coast Banker*, 129 F. (2nd) 395, (CA9) 1942 A.M.C. 1293; *The Providence v. The Georgia*, 282 Fed. 658; *The Law of Admiralty* by Gilmore and Black Pages 404-406.

Let an interlocutory decree be entered in favor of Hess Shipping Corporation and against the SS CHARLES LYKES and Lykes Brothers Steamship Co., Inc. holding the SS CHARLES LYKES solely at fault. If damages cannot be settled by consent, either party may make application to the court for further proceedings to determine damages.

INTERLOCUTORY DECREE

It is ORDERED, ADJUDGED, AND DECREED that Hess Shipping Corporation recover of and from the SS CHARLES LYKES and Lykes Brothers Steamship Co., Inc. the damages sustained by it in consequence of the matters referred to in its Complaint together with interests and costs; and that the Complaint of Lykes Brothers Steamship Co., Inc. be dismissed with costs; and it is further

Ordered that application for ascertainment of damages may be made to the court by the parties, or any of them, if the same cannot be agreed upon within sixty days from this date.

Entered this 28th day of May 1968.

DANIEL H. THOMAS
Chief Judge, U. S. District Court
Southern District of Alabama.

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IN THE

Supreme Court of the United States

October Term, 1970

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 367

LYKES BROTHERS STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MAY IT PLEASE THE COURT:

Comes now Hess Shipping Corporation, Respondent, and respectfully submits its brief in opposition to Petitioner's application for writ of certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the decision and judgment rendered by the United States District Court for the Southern District of Alabama.

(a) OPINIONS BELOW

(1) On May 28, 1968, Chief Judge Thomas of United States District Court for the Southern District of Alabama sitting in Admiralty without a jury rendered a decision holding Petitioner liable for damages resulting from a ship collision between Petitioner's SS CHARLES LYKES and Respondents ST .HESS VOYAGER, which decision is reported at 285 F. Supp 412.

(2) On October 10, 1969 a three judge panel, composed of Chief Judge Brown, Circuit Judge Godbold and District Judge Cabot (sitting by designation pursuant to 28 U.S.C.A. 291 and, therefore, empowered with the full authority as a Circuit Judge under the provisions of 28 U.S.C.A. 296), rendered its decision affirming this opinion reported at 417 F. 2d 346. The decision was authored by District Judge Ted Cabot with Judge Godbold concurring and Chief Judge Brown dissenting.

(3) Petitioner's statement that the Court of Appeals sitting *en banc* was evenly divided is true, as far as it goes. The fact is that Judge Cabot, of the United States District Court for the Southern District of Florida, sat by designation at the original hearing in the Court of Appeals and authored the majority opinion. Judge Cabot was not permitted to participate in the en banc rehearing but it stands to reason that the Court would not have been evenly divided had he been allowed to participate.

(b) JURISDICTIONAL GROUNDS

The Respondent is satisfied with the Petitioner's statements regarding jurisdiction of this Court.

(c) QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are not those set forth by the Petitioner for the following reasons:

(i) The controlling question is whether in this maritime ship collision case the District Court was "clearly erroneous" in exonerating the ST HESS VOYAGER and holding it to be free of contributing fault in the collision which is the subject of this petition.

(ii) There is no direct conflict between the judgment of the Fifth Circuit Court of Appeals here and that of the Court of Appeals for the Second Circuit in the GOLDSHELL-WHITE PLAINS' decision, 224 F. 2d 86, 1955 AMC 1438. The factual situation differs so completely in the two cases that neither should be used as a precedent for the other. These differences will be detailed in the ensuing argument.

(iii) There is no conflict between the judgment of the Fifth Circuit here and that of the Court of Appeals for the Second Circuit in the BURGAN-BERGECHIEF, 274 F.2d 469, 1960 AMC 1380. Here again, the facts in the two cases are essentially different. These differences will be detailed in the ensuing argument.

(iiii) Respondent knows of no reason why this Court should be called upon to make guidelines for naviga-

tors. The United States Coast Guard is the agency responsible for making guidelines under the Rules and for punishing violators thereof.[1] The Rules themselves were deliberately couched in flexible language so that they could be logically applied according to the existing circumstances of each particular case. That is the reason that Rule 27, 33 USC 212, was given the same force of statute as the main body of the Inland Rules.

STATUTES AND REGULATIONS INVOLVED

It is the Respondent's position that the statutes and regulations involved in the matter are as follows:

(a) Inland Rules, Article 16, June 7, 1897, C. 4, Section 1, 30 Stat. 99, 33 USC 192.

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

(b) Inland Rules, Article 25, June 7, 1897, 33 USC 210.

> "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that

[1] Gilmore and Black, The Law of Admiralty, P. 781; 46 U.S.C. 239

side of the fairway or mid-channel which lies on the starboard side of such vessel."

(c) Rule 52(a) Federal Rules of Civil Procedure

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

STATEMENT OF THE CASE

Petitioner's version of the facts in this case is so incomplete and in variation with the findings of both the District Court and the Court of Appeals that Respondent is compelled to submit what it believes to be an accurate statement of the case fully supported by the record and the decisions of the District Court and the Court of Appeals.

This collision, and the material events preceding it, occurred in the extremely narrow, dredged channel in the shallow waters of Mobile Bay. The Channel is a 400 foot wide ditch, 40 feet in depth, and it runs from the Gulf of Mexico through the shallow waters of Mobile Bay to the City of Mobile, a distance of approximately 35 miles. The physical characteristics of this Channel are shown on U. S. Coast & Geodetic Survey Chart No. 1266, the relevant portion of which was a trial exhibit and it is included as an annex at the end of this brief.

The navigation of both vessels was being controlled by Mobile Bar Pilots operating under licenses issued

by the U. S. Coast Guard. Each vessel's master, also licensed by the U. S. Coast Guard, was on the bridge with the pilot at all relevant times. All members of the Mobile Bar Pilot's Association are equipped with high powered walkie talkie radio sets which they have with them at all times while piloting vessels in and out of the Port of Mobile. These walkie talkie radio sets enable the pilots on duty to remain in constant communication with each other for the purpose of exchanging information relating to the navigation of their own vessel, other vessels within their immediate vicinity, the weather and tide conditions and any other special circumstances coming to their attention. The pilots of the two vessels here involved were in communication with each other *prior to and during the entire time the Charles Lykes was underway.*

The collision occurred at Buoy No. 42, located on the east side of the Upper Reach of the Mobile Ship Channel, at approximately 10:10 P.M., March 3, 1966. The outbound Charles Lykes was proceeding southwardly for the Gulf in route to Pascagoula, Mississippi, only a short distance from Mobile. Her booms and related cargo handling equipment had been left in an upright position to expedite loading on arrival at Pascagoula. The inbound Hess Voyager was proceeding from sea, northwardly, for the Port of Mobile. The Charles Lykes was partially ladened with cargo. The Hess Voyager had no cargo of any kind, her tanks having nothing in them but salt water ballast. Both vessels are registered and licensed under the laws of the United States.

The Charles Lykes is a relatively small cargo vessel, being 444 feet long and 63 feet wide, with a gross tonnage of 8,178 tons. She was built on the west coast of the United States in 1944.[2]

The Hess Voyager, although considerably smaller than the modern "super tanker" was large in comparison to the Charles Lykes. The Hess Voyager is 708 feet long with a width of 102 feet and gross tonnage of 27,015 tons.[3] Modern "super tankers" range from 50,000 to 200,000 tons.

The Upper Reach of Mobile Ship Channel runs almost due north and south (the coordinates being 002° for inbound vessels and 182° for outbound vessels.[4]

The relevant portions of the chart from Buoy No. 40 to the inner harbor in Mobile River (Pinto Island Reach) is reproduced as an annex hereto, as mentioned above.

Referring to the annex, it will be seen that the buoys and beacons marking the channel are numbered in ascending order from north to south.

The Mobile Ship Channel is a dredged cut maintained by the U. S. Corps of Engineers with a bottom width of 400 feet and a project depth of 40 feet.[5]

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[2]Hess Exhibit #1
[3]Hess Exhibit #2
[4]Hess Exhibit #3, U. S. Coast and Geodetic Survey Chart #1266
[5]Hess Exhibit #19

The relevant aids to navigation in the Upper Reach in the vicinity of the collision (Buoys No. 42 and No. 44) are located 150 feet outside and to the east of the 40 foot bottom width of the Channel.[6]

From the bottom, the dredged cut of the Channel's banks "slope" or "taper" upwardly and outwardly so that with a light draft vessel with a draft of as much as 22 feet a ship can pass very close to the markers and "almost rub them".

Both vessels were light at the time of collision and the Hess Voyager was drawing 22.03 feet aft and 10.09 feet forward, and the Charles Lykes was drawing 6 feet forward and 16.10 feet aft.

Referring again to the chart reproduced as an annex hereto, it will be observed that Buoy No. 44 marks the mouth of the Mobile River (which is shown on the chart as Pinto Island Reach), with everything below No. 44 being Mobile Ship Channel in Mobile Bay.

In the vicinity in question, Mobile Bay is very shallow and is not navigable outside the markers, and there are no anchorages between the outer bar at the mouth of Mobile Bay and the harbor itself in Mobile River, with the exception of one small "pocket" on the eastern side of the Channel in the vicinity of Beacon 38. A small vessel without radar was anchored in this "pocket".

On the night in question, the wind was from the

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[6]Hess Exhibit #19; App 154

southwest at 8 to 12 miles per hour.[7] At the time of collision, there was patchy fog with visibility restricted in ratio to density of fog. The tide was ebbing[8] at one and a half knots.

The Charles Lykes was sounding fog signals as she approached the point of collision, but with the wind from the southwest, none were heard by the Hess Voyager.[9] The Hess Voyager was also sounding fog signals, some of which were heard by the Charles Lykes.

The collision occurred on the extreme east side of the Channel at 2210 hours just as the Hess Voyager grounded from No. 3 tank forward on the extremity of the Channel's east bank with her starboard quarter 50 to 60 feet off Beacon No. 42 and with her bow heading northeasterly at 019°.[10] The Hess Voyager was so far out of the Channel that the tug that came to pull her free also went aground.[11]

The Charles Lykes, after striking the Hess Voyager, dropped her anchors, running out four full shots of chain and swung on her anchor chain from a southerly heading, back around to a northwesterly heading of 331 1/2 degrees.[12] Despite her length of 444 feet, the Charles Lykes did not go aground,[13] but anchored in the dredged Channel.

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[7]Hess Exhibit #4 and 5
[8]App 186
[9]App 239; Sup App 131, 140
[10]App 184, 198, 100, 117, 118, 132, 143; Sup App 130
[11]District Court's Findings of Fact
[12]App 74; Sup App 35
[13]App 74, 113

The Bell Book of the Charles Lykes shows that she logged Buoy 44 at the mouth of the River at 2205 and collision at 2210.[14] In this five minute period, she covered the chartered distance of .875 nautical miles. Thus, in the approach to the point of collision, the Charles Lykes made good a speed of 10.5 knots over the ground.

The erratic behavior of the Charles Lykes was explained by those in charge of her navigation as resulting from the fact that her cargo booms had been left in the upright position[15] so that the scanner, located below the tops of her booms on top of the starboard side of the bridge,[16] would not pick up targets ahead and to the east side of the Channel (to the left of the Charles Lykes) such a crucial Buoy No. 44[17] and Buoy No. 42,[18] and even the Hess Voyager itself because of what her master described as "that boom clutter".[19]

The fog thickened as the Charles Lykes approached Buoy No. 44 in anticipation of making the 28 degree course change to her right (from 154° to 182°) and the Charles Lykes' radar failed to pick up Buoy No. 44. This caused her pilot to proceed beyond the point where he normally would have changed course.[20] As a result of this delay, when he did change his course to 182°, he was well over on the eastern side of the

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[14]Hess Exhibit #15
[15]App 57, 58
[16]Hess Exhibit #13A
[17]Sup App 91
[18]App 56; Sup App 115
[19]App 85
[20]Sup App 91

Channel. From this point on, the Charles Lykes never recovered her proper position in the Channel, i.e. her own starboard side (west half of the Channel). She continued down the east side of the Channel in spite of having been notified by the Hess Voyager that she needed to move over to her starboard, and worse still, informing the Hess Voyager by voice radio that she was in the process of moving over. The Charles Lykes' pilot was unable to accept the fact that he was out of position and was in danger of collision with the Hess Voyager. He mistakenly assumed that the Hess Voyager had not come within the range scale setting of his radar and since his radar was picking up objects off his starboard bow, he mistakenly assumed that it would pick up the Hess Voyager when the latter came into range. In his own words, he was "reassured"[21] that his navigation was not leading him into danger of collision with the Hess Voyager. This persistence in pursuing a course on the eastern side of the Channel caused the District Court to make an official finding of fact that "the Charles Lykes would have collided with her (Hess Voyager) even if she had been dead in the water."

The Hess Voyager during the entire time the Charles Lykes was underway at slow ahead, hugging the east bank, stemming the current with her radar functioning properly, [illegible] repeated [illegible] tions from the Charles Lykes that the latter was in the process of moving over to her own starboard side of the Channel. The Hess Voyager did the only thing she could do to avoid the collision — she ran completely out of the Channel until she grounded but she

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[21] App 260, 261

was nevertheless struck by the Charles Lykes as she ran aground. It will be recalled that the channel banks are tapered outward and upward; that the Hess Voyager was drawing ten feet forward and twenty two feet aft (a mean draft of sixteen feet); that the vessel was hard aground at No. 3 tank at the moment of collision. It is apparent that the Hess Voyager was completely out of the channel even before the vessels were visually sighted.

(f) BASIS FOR FEDERAL JURISDICTION

Respondent is satisfied with Petitioner's statement of jurisdiction.

(g) REASONS FOR NOT ALLOWING THE WRIT

Petitioner's attempted condemnation of the Hess Voyager because she is a tanker type vessel is inappropriate to say the least. The only cargo aboard the vessel was salt water. Reference to other unrelated casualties involving petroleum carrying vessels is so manifestly improper that Respondent will not dwell upon them.

Petitioner next quotes from the dissenting opinion of Judge Brown. Judge Brown is apparently alarmed that this case will be construed as an abandonment by the Fifth Circuit of the so called 'rule of sight' doctrine and of the requirement of Article 16 to 'stop engines'. Such is not the case. The trial court and the majority opinion both held *that under the existing circumstances* the Voyager's speed was moderate; that the stopping of engines was not required by the

rule because the position of the Charles Lykes was known and further, that the stopping of the Voyager's engines *under existing circumstances* would probably have thrown her out of control thereby creating a more dangerous situation than would otherwise have existed. The attendant circumstances, the safety of other vessels in the immediate vicinity, as well as the safety of the Hess Voyager itself, fully justified these findings and conclusions. In addition to these findings and conclusions, the Court specifically found that "The Charles Lykes would have collided with her (the Voyager) even if she had been dead in the water.".

1. SPEED OF THE HESS VOYAGER WAS MODERATE AND WAS NOT A CAUSE OF COLLISION

Petitioner states on page 9 of its brief that the court held the HESS VOYAGER's speed to have been moderate because of the "great size of the vessel," which "... seriously impaired the pilot's ability to control the vessel".

What the court actually held was that based on all the facts the speed of the HESS VOYAGER was moderate and prudent, and that, among other things reduction of speed and loss of steerageway would probably have resulted in a more serious collision.

The record clearly shows that the HESS VOYAGER had reduced speed to Slow Ahead during the entire time the Charles Lykes was underway.

Under Article 16 of the INLAND Rules, "moderate speed is a purely relative term which means no more

than the vessel must run at prudent rate of speed, time, place and circumstance rather than swiftness over the course determine whether the actual speed was immoderate in that it was imprudent". *Quinette vs. Bisso*, 136 F. 825 (5th Cir. 1905); to the same effect see the *James A. Carney*, 192 F. 216 (S.D. Ala. 1911), aff'd. 203 F. 975 (5th Cir. 1913); or, as the Second Circuit expresses it, "moderate speed is less than full speed, but the term is a relative one and precisely how much less *depends on the peculiar circumstances of each case.*" *Polarus S.S. Co. vs. The T. S. SANDJEFJORD*, 236 F. 2d 270 (2d Cir. 1956), cert. den., 352 U.S. 92, 1 L.ed 2d 365.

Moderate speed under Article 16 is rather "vague" and it cannot be applied "mechanically" or with "certainty" as Petitioner seeks here to do, because the speed chosen must be done with due regard to the actual factors producing danger — such as "traffic to be anticipated". *The Law of Admiralty*, Gilmore and Black, page 416. Likewise, it has been held that the rule of moderate speed "is not a universal one to be applied blindly", *Gertrude Parker, Inc. vs. Abrams*, 178 F.2d 259 (1st Cir. 1949).

Having shown that "moderate speed" under the rules is a relative term, varying according to the circumstance in each case, in both the Second Circuit and the Fifth Circuit, the inquiry next is whether the question of speed is one of fact. In *China Union Lines, Ltd. vs. A. O. Andersen*, 364 F. 2d 769 (5th Cir. 1956), a ship collision case, the court squarely held:

"A prudent speed under the circumstances was an issue of fact for the judge. *Socony Vacuum Oil Co. vs. Smith*, 179 F. 2d 672 (5th Cir. 1950)."

In addition to holding that speed of the HESS VOYAGER was moderate, the trial court also held that her speed was not a contributing cause of the collision for the reasons that (1) the HESS VOYAGER was aground at the time of collision (2) that maintenance of headway probably avoided a more serious collision than would actually have otherwise occurred.

These findings of fact clearly are overwhelmingly supported by substantial evidence. The HESS VOYAGER had just completed a passage with the SS CLAIBORNE, a ship of the exact dimensions, size and construction as the CHARLES LYKES. It effected that passage with the CLAIBORNE at the same speed she would have made her passing with the CHARLES LYKES. The HESS VOYAGER was in radio contact with the CHARLES LYKES and was advised by the CHARLES LYKES that she was moving over to effect the intended port to port passage.

This is not a case in which the HESS VOYAGER was trying to ascertain the position of a vessel which it could not locate.[22] Neither is it a case where the HESS VOYAGER was in open water so that vessels could be expected from all angles of the compass.[23]

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[22] See United N.Y. Sandy Hook Pilots Assn. v. Den. Norske etc. 121 F 2d 304 (2d Cir 1941) holding position "ascertained" where movements were entitled to be "forecast".

[23] cf. *The Martello*, 153 U.S. 64, 38 L.ed 637 (1893)

On the contrary, the HESS VOYAGER knew that the CHARLES LYKES was located in the Mobile Ship Channel below buoy number 44, and she was told by the CHARLES LYKES that she was moving over for port to port passage — a movement to its right of only 100 to 150 feet which could be expected to cause no difficulty. However, the blocked-out radar of the CHARLES LYKES made this maneuver impossible because neither the Hess Voyager or the channel markers could be seen on radar.

The evidence is clear, convincing and undenied that had the HESS VOYAGER not maintained headway so as not to "fall off in the wind," loose headway and get "crossways of the channel", it would have made collision a certainty and probably resulted in a much more serious collision than the glancing blow which actually occurred.

The CHARLES LYKES did not make good its radio advices that it would regain its own side of the channel, but on the contrary, it remained out of position and collision resulted. The erratic behavior of the CHARLES LYKES was not to be foreseen or anticipated by those in charge of the navigation of the HESS VOYAGER. As this court has said in *The VICTORY and PLYMOTHIAN*, 168 U.S. 410, 42 L. ed. 519 (1897):

> "None of the excuses set out by the VICTORY for being on the wrong side of the channel tended to palliate her guilt ... each of these vessels was entitled to *presume* that the other would act lawfully; *would keep to her own side of the channel;* if temporarily crowded out of her

course *would return to it and that she would pursue the customary track of vessels in the channel*... We are of the opinion that the PLYMOTHIAN was on her own proper course; and that she *was not bound to anticipate* the conduct of the VICTORY; . . ." (Emphasis Supplied)

2. FAILURE OF THE HESS VOYAGER TO STOP ENGINES DID NOT CAUSE OR CONTRIBUTE TO THE COLLISION BUT ACTUALLY AVOIDED A MORE SERIOUS COLLISON

Corollary to the theory that the HESS VOYAGER should have further reduced its speed below Slow Ahead, Petitioner also argues that paragraph 2 of Article 16 required that the HESS VOYAGER, under the circumstances of the case, stop its engines prior to the collision.

Quite aside from the fact that the HESS VOYAGER did not hear any fog signals which the CHARLES LYKES claims it sounded, and quite aside from the fact that the HESS VOYAGER had put its engines astern prior to collision, and quite aside from the fact that the position of the CHARLES LYKES had been "ascertained" by both radio and radar,[24] and quite aside from the fact that the CHARLES LYKES had reported to the HESS VOYAGER that it was regaining its side of the channel preparatory to a port to port passage, and quite aside from the fact that the HESS

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[24]United N.Y. Sandy Hook Pilots Assn v Den Norswe etc. 121 F2d 304 (2d Cir. 1941)

VOYAGER was aground at the time of collision, it is very clear that any failure to stop engines was a mere technical violation which in no way caused the collision. On the contrary, it is equally clear that stopping of engines in these restricted waters, just as in the case of reduction of speed, would probably have caused a more serious collision under the circumstances of the case.

Under circumstances almost paralleling the case at bar the Fifth Circuit has held that where one vessel failed to maintain the starboard side of the Houston Ship Channel and the other vessel did not stop engines, the failure to stop engines was a non-contributive fault under Article 16 of the Inland Rules. *The Standella,* 108 F. 2d 619 (5th Cir. 1939). There, the court said:

> "From all the evidence it clearly appears that the collision occurred on the east side of the channel; that the M V Standella was negligently navigating on her port side of the channel; and that had she kept to the west (her starboard) side the collision would not have occurred.
>
> *The M V Standella was guilty of a most serious statutory fault when she navigated on the port side of the fairway or mid-channel.* Section 210, 33 Mason's U.S.C., provides: 'Steam vessel in narrow channel . . . *This is a cardinal rule of navigation and applies as well in fog as in clear weather.* The most ignorant navigator will be presumed to know this simple

and wise requirement. Yarmouth, 100 F. 667; Newport News, 105 F. 389, 393.

The M/V Standella claims fault against the Andrew for failing to stop her engine and cites Article 16, 33 Mason's U. S. C., Sec. 192 which provides: 'Speed in fog, etc...'

It is without dispute that the Andrew failed to stop or reverse her engines, and that at the time of the disaster she was moving at a speed of about two or two and one-half miles per hour. It is clearly shown, however, that the failure of the Andrew to stop or reverse her engine did not cause the accident. Her failure to stop in no wise contributed to the collision. The M/V Standella was moving out to sea on the wrong side of the channel. *Had the Andrew stopped her engines she would have been in the path of the oncoming M/V Standella and the collision would have in all probability been more serious than it was.* The liability for damages is upon the ship or ships whose fault caused the injury and where, as here, the fault of one vessel could have had nothing to do with the collision that fault may be dismissed from consideration. Pennsylvania, 86 U.S. 125, 136; Providence, 282 F. 658, 661. *The failure of the M/V Standella to comply with Article 25 was the sole cuse of the collision and she must answer in damages for the injuries sustained by the Andrew.* Vanderbilt, 73 U.S. 225, Providence, 282 F. 658; Pennsylvania, 86 U.S. 125. The judgment is affirmed." (Emphasis supplied)

It is submitted that the stopping of the HESS VOYAGER's engines could not have been a contributing fault under the circumstances of this case since under the undisputed evidence the stopping of engines would probably have caused a serious and dangerous collision. *The Providence*, 282 F. 658 (D.C. R.I., 1922); *The Coast Banker*, 120 F. 2d 395 (9th Cir. 1942); *Gertrude Parker, Inc. vs. Abrams*, 178 F.2d 259 (1st Cir. 1949).

Of similar import is the recent case of *Union Oil Company of California vs. Tugboat San Jacinto*, 304 F. Supp. 519, (U.S.D.C. Oregon — 1969). There, where one vessel cut across the channel and navigated on the wrong side of a narrow river channel in fog, the court, after showing the gross fault of the vessel which was navigating on the wrong side of the channel, found as a matter of "common sense and the overwhelming weight of evidence" that the vessel was guilty of gross fault for navigating on the wrong side of the channel and was solely at fault regardless of the fact that the opposing vessel had not stopped engines. In this connection the court held:

> "There is no doubt in my mind but that the SS Santa Maria 'ascertained' the position of the tug San Jacinto prior to and at the time of the Tug San Jacinto's fog signals. Consequently, the SS Santa Maria was justified in proceeding without stopping her engines. *This 'ascertainment' may be made by radar and is an adequate justification for failure to comply with the technical requirements that the engines be stopped. For that matter it probably would*

have been a lack of good judgment on the part of those in charge of the SS Santa Maria to stop their engines and loose steerageway in this very narrow channel. United States vs. Motor ship Hoyanger, 265 F. Supp. 730 (W.D. Wash., 1957); *Universal Insurance Co. vs. The Coast Banker*, 129 F.2d 395 (9th Cir. 1942). The decision in *China Union Lines, Ltd. vs. A. O. Anderson & Co.*, 364 F.2d 769 (5th Cir. 1966) is very persuasive on my decision on the facts in this case. Here, those in charge of the navigation of the SS Santa Maria had no reason to believe that the Defendants would have *cut across the bow of their ship. It is my view that any possible violation of Article 16 of the Inland Rules by the SS Santa Maria or those in charge of her navigation, were technical in nature and were not a contributing cause of the collision.* The law on this subject is clear ..." (Emphasis supplied).

and in *The Umbria*, 166 U.S. 404, 41 L.ed. 1053 (1896) this court held:

"It is probably also true that, considering the great speed of the Umbria, *it were better that the Iberia should keep her steerageway rather than stop her engines and reverse*, since she would respond to her wheel more readily if her engines were kept in motion and if her headway were not entirely stopped ... These rules are intended for the prevention of collisions and if it be apparent that the observance of a certain rule would not have prevented a collision in a

particular case, the non observance of such a rule becomes immaterial ..." (Emphasis supplied).

3. THE GROSS FAULT OF THE CHARLES LYKES WAS THE SOLE CAUSE OF COLLISION

It cannot be denied, and indeed it has not been attacked, that the CHARLES LYKES was grossly at fault. Without a doubt the petitioner has violated the "cardinal rule" of navigation in narrow channels by failing to maintain its own starboard side of the channel. *The Standella*, supra. It is submitted that this violation amounts to gross fault which was the sole and proximate cause of the subject collision. Under such circumstances this court in *Alexandre vs. Machan*, 147 U.S. 72, No. 37 L.ed. 84 (1892), held as follows:

> "In view of the recklessness which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. *Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel.* There is some presumption at least adverse to it claim in any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." (Emphasis supplied).

The rulings of the Fifth Circuit are in accord. *The Queenston Heights*, 220 F.2d 120 (5th Cir. 1955); *The Evelina*, 243 F.2d (5th Cir. 1957); *Ducol v. Mississippi River Bridge Authority*, 295 F. 2d 223 (5th Cir. 1968); *Moran Towing and Transportation Co. v. Empressa Hondurena de Vapores*, 194 F.2d 629 (5th Cir. 1952).

4. THE RULING OF THE TRIAL COURT AS AFFIRMED BY THE COURT OF APPEALS IS NOT CLEARLY ERRONEOUS

The petitioner is here actually seeking to rehash or retry the factual issues resolved against it. However, unless the findings of the trial court as affirmed by the court of appeals are clearly erroneous, so that the Court is convinced on the entire evidence and is "left with the definite and firm conviction that a mistake has been committed", the petition should not be granted. *McAllister vs. United States*, 348 U.S. 19, 99 L.ed. 20 (1954); Rule 52, F.R.C.P; *Alexandre vs. Machan*, supra. In applying the principal announced in *McAllister*, supra, the court, in *The Evelina*, supra, held that where gross fault of one ship was sufficient to account for the collision alleged violations of the other vessel would not be held to contribute. Said the court:

> *"Failure on the part of the Edward T to follow the rules there might have been, but the question is whether that fault was a contributing cause to the collision.* The record does not require such a finding. *The District Court found otherwise. We may not set aside the District Court's judgment unless it is clearly erroneous.*

McAllister vs. United States, 348 U.S. 19, 1954 A.M.C. 1999; see *J. Dick Towing Co. vs. Leo*, (5th Cir. 1953) ..." (Emphasis supplied).

See also *American Law of Collisions*, Griffin, pages 506-508.

In maritime collisions, findings of fact by the District Court relative to proximate cause and contributory negligence have uniformly been held to be questions of fact to be determined by the District Court. *Safe Harbor Enterprises, Inc. vs. Shrimp Trawler Hazel H.* 301 F.2d 139 (5th Cir. 1962); *A R Seljan and M/V Stolt Sildra vs. Pioneer Leasing Corp.*, 406 F.2d 768 (5th Cir. 1969); *in re Rapps Petition*, 255 F.2d 628 (7th Cir. 1958); *U.S. vs. Soriano*, 366 F.2d 699 (9th Cir. 1966).

The language of the Fifth Circuit in connection with another Mobile Ship Channel case should have application here. In *Moran Towing and Transportation Co. vs. Empressa Hondurena de Vapores*, supra, the Fifth Circuit in speaking of the trial court's ruling even before the advent of the *McAllister case*, supra, said:

> "In these circumstances, the proper, the only safe, course for this court to pursue, is, we think, not to seek to reconstruct the scene for ourselves, making our determination of fault as though we were the triers, but instead to adopt as our own the findings of the distinguished and lamented trial judge: Familiar as he was from a lifetime of residence, with the waters of Mobile Bay and with the navigaton thereon, and endowed by nature and experienced with a fine sense of rusticum jus fitting

cases of this kind where the matter may not be determined with precision, he brought to the hearing of this case, among the last tried by him, and to the study of the record made, a true and tried equipment."

5 THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE FIFTH CIRCUIT AND THOSE OF THE SECOND CIRCUIT

(a) The Goldshell-White Plains Decision is in harmony with the Decisions of the Fifth Circuit.

The petitioner contends at pages 9-10 of its brief that the decision of the Second Circuit in *Goldshell-White Plains*, 224 F.2d 86 (2d Cir. 1955) is in conflict with the decision of the Court of Appeals in the instant case. We believe the holding in *Goldshell* is in harmony with the decision of the Court in the case at bar.

The *Goldshell* decision in the opinion on rehearing reported at 224 F.2d 86 merely holds that maintenance of steerageway is not an excuse for excessive or "immoderate" speed, the decision is otherwise distinguishable on its facts.

In the first opinion in Goldshell (reported at 222 F.2d 75) it is apparent that the two vessels met in New York's North River, a body of water entirely different from that of the Mobile Ship Channel at the point in question. It further appears that the North River has been held by the Second Circuit *not* to be a narrow channel within the meaning of Article 25, Inland Rules,

33 U.S.C.A. 210.[25] Therefore, there was no requirement under the circumstances in Goldshell that vessels each keep on their own right hand side of the channel. The reason for this is that there were many piers in the North River which extended into the river and there was so much "cross traffic" that the requirements of a narrow channel did not apply. This, of course, is entirely different from the situation in the narrow dredged Mobile Ship Channel which is bordered by spoil banks and in which there is absolutely no "cross traffic".

Furthermore, the collision in Goldshell, supra, was more of a crossing situation rather than a situation involving a meeting or passing situation. The White Plains was "showing her green light" and the Goldhell was "showing her red light".

Thus, no narrow channel rule was in effect, no radio contact was had, no radar ascertainment of position was made, and, thus, the speed of the vessels and the failure to stop engines of both vessels were solely determinative of fault because they were in that case, the only proven and existing "circumstances of the case" under Article 16.

Under circumstances of closer similarity to the instant case, the Second Circuit, has made it quite clear that there is no conflict between it and the Fifth Circuit regarding the application of Article 16. In *Polarus Steamship Company vs. The T. S. Sandjeford*, 236 F.2d

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[25]The Islander, 152 F. 385 (2d Cir. 1907); The Goldshell-White Plains, supra.

270 (2d Cir. 1956) the Second Circuit affirmed the District Court finding of moderate speed where the vessel's full speed was 12 knots and she was proceeding at 6 knots through the water when the other vessel was guilty of misuse of its radar and was "*merely guessing that the Polarus was steering a course parallell with the coast line*" and thereby imposed sole fault on one of the vessels. In this connection the court said:

> "Moderate speed is undoubtedly less than full speed ... but the term is a relative one and *precisely how much less the statute requires depends on the peculiar circumstances of each case. The Pennsylvania*, 19 Wall. 125, 85 U.S. 125, 22 L.ed. 148; *The Bayonne*, 213 F.216 (2d Cir; *Quinette vs. Bisso*, (5th Cir.) 136 F. 825 ... *The State of Alabama*, supra ... true it is that there are statements that in congested waters, and at times elsewhere, anything more than bare steerageway in the presence of fog may be too much ... Even more frequently the applicable rule has been said to be that no vessel shall be operated in a fog at a speed which is so fast that she cannot stop within the distance her helmsman can see ahead ... *but these are not rules of thumb to be applied willy-nilly. They are but glosses upon the basic rule requiring operation at a moderate speed, and, like it they must be applied according to the particular circumstances of each case.*" (Emphasis supplied).

Thus, it is seen that the rule of both the Fifth and Second Circuits are the same and that the Second Cir-

cuit has even quoted the Fifth Circuit decision of *Quinette vs. Bisso*, supra, with approval.

In a narrow channel in the face of an oncoming vessel, maintenance of steerage is obviously a much more relevant circumstance under the provisions of Article 16 than it is in open water or in channels which are not "narrow" channels within the meaning of Article 25 (33 U.S.C.A. 210).

Thus, in *Afran Transport Co. v. The Bergechief* 274 F.2d 469 (2d Cir. 1960) the Second Circuit said that under Article 16 a vessel "in open water" is not entitled to maintain steerage.

Similarly, this court has said that speed should only be reduced to the "*lowest point consistent with good steerage way*" where the vessel is entering a harbor where she is "likely to meet vessels from at least a dozen points of the compass", i.e. New York harbor. *The Martello*, 153 U.S. 64, 38 L.ed 637 (1894). This is what the HESS VOYAGER did in the case at bar.

The physical characteristics of Mobile and its Ship Channel, show that at the point in question (Buoy 42) traffic can approach but from one direction, i.e. the north on an outward course of 182° true.

Thus, in cases involving navigation in narrow channels, rather than cases in "open water" where traffic is approaching from all angles, or where there is "cross traffic" the Courts have uniformly held as a matter of fact that steerage way should be maintained in fog. *Union Oil Co. vs. Tugboat San Jacinto*, supra, *The*

Standella, supra, *The Coast Banker*, supra, the Motor Ship *Hoyanger*, 265 F.Supp. 720 (W.D. Wash., 1967), *China Union Lines, Ltd. V.A.O. Anderson and Co.*, supra, *The Burgan-Bergechief*, supra, the *Martello*, supra; *Gertrude Parker, Inc. v Abrams*, supra.

Thus, in *The Hare* (1904) .P. 331 the British Court held that a ship proceeding down the ship channel at Manchester, England need not stop engines on hearing a fog signal on grounds that the position of the vessels ahead of her in the channel, which was presumably on the proper side of the canal, was ascertained under the rules. See also *White Stack Towing Corp. v. Bethelehem Steel Co.*, 279 F. 2d 419, 82 ALR 2d 757 (4th Cir. 1960).

It would seem inconceivable as a matter of common sense that any action which would have resulted in a more serious collision could be legally required.

(B) The decision in Burgan-Bergechief does not conflict with the case at bar.

Petitioner argues at page 10-11 of its brief that the decision of the Second Circuit in the Burgan-Bergechief, 274 F. 2d 469 (2d Cir. 1960) is in conflict with the case at bar. The court in the Bergechief, supra, made the natural statement in passing that "use of radar does not justify a failure to obey rules of navigation *generally applicable*." From this, Petitioner asserts that there is a conflict of law between the courts.

The instant case does not, in any respect whatever, hold that the use of radar justifies a failure to obey the rules of navigation generally applicable. On the contrary, the most that can possibly be claimed to emerge from the holding in the instant case is that a radar observation of a vessel known to be within the confines of a 400 foot channel and whose position has been confirmed and acknowledged by radio communication constitutes a sufficient "ascertainment" of the observed vessel's position.

The vessels involved in the Bergan-Bergechief were navigating in the open sea off the coast of Maine. They were not confronted with the continuous and urgent problem of maintaining position within the confines of an extremely narrow channel. The vessels were not even subject to the requirements of Article 25 of the Inland Rules. The specific holding of the Second Circuit was that the failure to properly use radar when it was available constituted fault.

It is apparent from a comparison of the Bergechief decision and the decision of the case at bar, that the Bergechief simply confirms the holding of the Trial Court and the Court of Appeals in the instant case that a vessel may be condemned for improper use of radar.

As a matter of fact, the Bergechief, at least by inference, supports the view that steerageway should be maintained in *confined* waters. The Court stated: "In a dense fog as we have in this case *and in open water* a vessel is not entitled to maintain steerageway * * *" (Emphasis added.)

The Court here has not held that the use of radar justified any violation of the Rules of the Road but has held only that speed was moderate and any loss of steerageway by stopping of engines or otherwise would have created a more certain and serious collision than actually occurred. Finally, the Court here has held that the HESS VOYAGER was aground at the moment of collision and that the CHARLES LYKES would have collided with her even if she had been dead in the water which disposes of the Petitioner's argument by showing that, as a matter of fact, neither speed, nor failure to stop engines was a proximate cause of the collision.

SUMMARY AND CONCLUSION

It is submitted in summary that the decision of the District Court was eminently correct and not clearly erroneous. It cannot be doubted and indeed it has been admitted that the CHARLES LYKES was guilty of gross and flagrant fault (1) for leaving the port, (2) blocking her radar scanner, (3) navigating on the wrong side of the channel, (4) for excessive speed, (5) for failing to make known by radio to the HESS VOYAGER her radar blindness which resulted from the negligent act of leaving her booms rigged because she intended to load cargo early the next morning and (6) for advising the HESS VOYAGER that she was moving over when she was actually mislead by her own radar from doing so.

Under the circumstances, we submit that the collision was foredoomed from the time the CHARLES LYKES missed and overran buoy number 44.

The pilot of the CHARLES LYKES testified at trial that he had made up his mind to anchor, but not until after he had met and passed the HESS VOYAGER. In the totally blind condition of the CHARLES LYKES it is submitted that the CHARLES LYKES had no chance at all of regaining its side of the channel or of otherwise avoiding the collision unless warning of its predicament was given to the HESS VOYAGER by radio, whistle signal or otherwise, neither of which was done. Quite the contrary, the CHARLES LYKES, strangely enough, completely refused to own up to the fact that it was lost in the mouth of the river in heavy fog with its booms blocking its radar while proceeding down stream at a speed of 10 1/2 knots (or 6 knots in the opinion of its pilot). Indeed, it contented itself with merely advising the HESS VOYAGER that it would move over, and thus to the bitter end invited the intended port to port passing. Misleading radio conversations in this respect have been the comment of another court under strikingly similar circumstances. In *Pennsylvania Railroad Company vs. SS* MARIE LEONHARDT, 320 F. 2d 262 (3rd Cir. 1963) the court, in speaking of a misleading radio conversation from a bridge tender to an approaching vessel held:

> "It was by this means that this advance method of communication (radio) that the power operator gave information to the vessel. *Part of that information was misleading* ... at no time after the passage of the train over the drawspan did either of the bridge employees give the vessel any indication ... of further delay in the opening of the draw. *If the draw*

was not ready to open at that time, the bridge should have informed the vessel of that fact, either by radio, phone or by an appropriate horn or whistle signal. The District Court did not err in finding that the bridge was at fault was the cause of the collision." (Emphasis supplied).

Under the circumstances recited above, we submit that the behavior of the CHARLES LYKES could not be "reasonably or logically" anticipated or foreseen; *the VICTORY and the PLYMOTHIAN*, supra.

The conduct of the HESS VOYAGER in proceeding at slow speed to maintain steerage hard by the east bank and in completely vacating the channel when collision became apparent to it, so as to run hard aground on the east bank outside of the buoy line was entirely proper and justified. As the pilots felt and the lower courts held, the failure to stop engines probably avoided a more serious collision than that which occurred. *The Standella*, supra.

Respectfully submitted,
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CERTIFICATE OF SERVICE

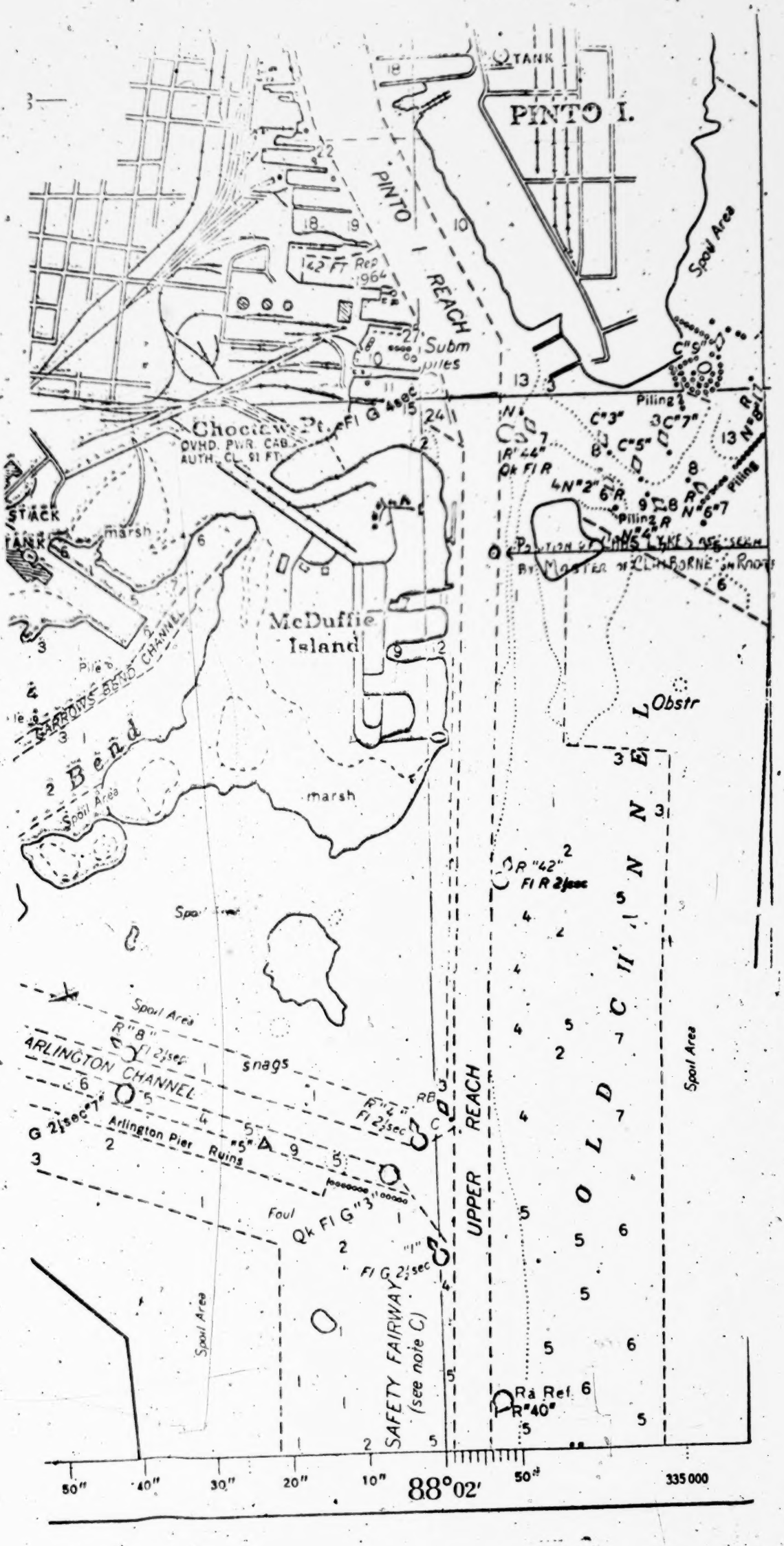
I, Theodore K. Jackson, a member of the bar of this Court, hereby certify that three copies of the above and foregoing brief have been served on Petitioner's Counsel of Record, Benjamin W. Yancey, Esquire, by depositing same in the United States mail, postage prepaid, addressed to him at his office in New Orleans, Louisiana on this day of August, 1970.

THEODORE K. JACKSON

October Term 1970 - No. 86

versus

Respondents.



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Supreme Court of the United States

OCTOBER TERM, 1970

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem.,
Respondents.

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MAY IT PLEASE THE COURT:

The utter disregard evidenced by our opponents for the law applicable to this case (as well as for the evidence contained in the record) and for the fact that *it presents, directly and squarely, basic legal questions of the utmost importance* - not questions of fact - compels the filing of this reply brief.

Respondents would seek to delude the Court with the idea that this case presents a factual dispute, subject to the "clearly

erroneous" doctrine, and is not in conflict with the other circuits as well as the prior decisions of the Fifth Circuit itself. Nothing could be further from the truth; Chief Judge Brown, a leading practitioner of and authority on collision law prior to his appointment to the bench, stated, in his dissenting opinion:

> "* * * Rule 16 is now dead in the Fifth Circuit. * * * The decision obliterates the two mandatory imperatives of Rule 16 - (1) moderate speed and (2) stopping engines. * * * breaching the moderate speed Rule-of-Sight is a mere technical violation. * * * the court gives its blessing to a vessel plowing right on in the fog toward a ship known to be in its path. * * * (The decision) does not even begin to pay even a deferential bow toward Rule 16, the court's action is nothing more than to write out Rule 16.* * *"

This is what the Fifth Circuit has done with seven members of that court for affirmance and seven members for reversal. *The extent to which this case begs for the granting of a writ by this Court and its reversal to achieve harmony between the circuits, as well as safety of life at sea, makes it entirely unique.*

Respondents urge that the United States Coast Guard is "responsible for making guidelines under the Rules", deliberately misciting a text which states that they "are in part enforced by the Coast Guard, as well as by the private liability system we studied (in another chapter)". It is the height of absurdity to suggest it is not this Court (and the lower Federal courts under its supervision) to which all concerned, including the Coast Guard, must look for guidance in the application and interpretation of the navigational rules; this is precisely what is required here.

I.

The decision, affirmed by the evenly divided Fifth Circuit, directly conflicts with the Second Circuit decision in the *Goldshell-White Plains*, 224 F. 2d 86, 1955, AMC 1438.

The Hess brief would seek to support the proposition that the *Goldshell-White Plains* decision - patently applicable here - can be distinguished by the fact that the vessels there were operating in open water rather than in the relatively narrow channel in which the HESS VOYAGER collided with the CHARLES LYKES. This argument is so antithetical to the Inland Rules as to be absurd. Plainly, where navigation is constricted and risk of collision increased thereby, there is the greatest need, not less, for the maintenance of moderate speed and *it cannot be urged that an immoderate speed is made acceptable by the narrowness of the waterway.*

When this argument is considered in the context of the facts existing in this case, it becomes even more incomprehensible. We refer specifically to the admitted fact that *the HESS VOYAGER, in its radar, saw the CHARLES LYKES at a distance of 2 miles* and during the entire time to the point of collision *was aware of the fact that the CHARLES LYKES remained dead ahead and that the vessels were on a collision course.* There was no room for the navigators of the HESS VOYAGER to "presume" or otherwise speculate as to what the CHARLES LYKES was doing, as her counsel would seek to suggest. There was nothing for her to "anticipate" or "foresee": *she actually observed, by radar, that she was on a collision course.* The HESS VOYAGER, accordingly, knew precisely what was being done by the other ship - it was remaining dead ahead where collision inevitably would occur if no steps were

taken by the HESS VOYAGER to avoid that result. *No steps were taken - the collision resulted - inevitably.*

That the requirement of moderate speed in fog under Article 16 of the Inland Rules applies to narrow channels is not subject to question. The statute plainly requires it, by its very terms, and certainly the decisions so hold. *The SYLVIA ARROW & URIAH LUCKENBACH*, 104 F. 2d 102, 1939 AMC 1596 (CA, 2) cert. den. 308 US 603, 84 L. Ed. 501, 60 S. Ct. 140; *The PENNSYLVANIA*, 288 Fed. 666 (CCA, 1, 1922); *The ARMOUR III*, 100 Fed. 667 (D.C., Mass., 1900); *U.S. vs. MS HOYANGER*, 265 F. Supp. 730, 1967 AMC 1047 (D.C., Wash.).

The cases cited to justify her immoderate speed simply do not support - even inferentially - the position of the HESS VOYAGER. The American cases have nothing whatever to do with the point for which they are offered and the English case of *The HARE*, (1904) P. 331, 90 LT 323; 73 LJP 47, 9 Asp. MC 547, dealt only with a local condition. As demonstrated in *The SEDGEPOOL*, (1956) 2 Lloyd's Rep. 668, it is equally a fault to run at immoderate speed in fog in a narrow channel under English law as it is under the law of this country.

The HESS VOYAGER, moving at 7½ knots through the water, was guilty of grossly immoderate speed. As stated in *The SITALA*, (1963) 1 W.L.R. 639 (1963) 2 All E.R. 290, (1963) 1 Lloyd's Rep. 205:

> "* * * High speeds at collision cause much greater damage than low speeds. High speeds before collision give less time to appreciate properly the development of the situation. * * *"

Similarly, it was said in *The No. 1*, 161 Fed. 847 (CCA, 2, 1908) that:

> "* * * the important inquiry, notwithstanding that each had come nearly to a stop at the time of collision, is what were their respective speeds before they began trying to keep clear of each other. * * *"

The evidence here is plain: the HESS VOYAGER proceeded at a speed of 7½ knots in fog which gave her a visibility of 300 feet. She did not stop or slow her engine speed at any time prior to the collision although her mate heard the fog signals of the CHARLES LYKES "within the 2 mile area when we were coming together"[1] and she knew the CHARLES LYKES remained dead ahead. *In no manner can this navigation be reconciled with either the statute or the decision of the Second Circuit in the Goldshell-White Plains.*

II.

The decision, affirmed by the evenly divided Fifth Circuit, directly conflicts with the Second Circuit decision in *The Bargan-Bergechief*, 274 F. 2d 469.

Under the *Bargan-Bergechief* decision of the Second Circuit, *radar observation does not constitute ascertainment sufficient to excuse compliance with Article 16.* The Fifth Circuit has held quite the contrary here.

Even more amazing is the fact that such "ascertainment", as was found by the Fifth Circuit to excuse compliance with the

[1] Supp. App. 67. The signals were also heard by her lookout, Supp. App. 257.

fog rules, *was a determination that the CHARLES LYKES was dead ahead and that the vessels were on a collision course.* If this is ascertainment to excuse compliance, the Inland Rules are meaningless or, as said by Chief Judge Brown in his dissent, *"Rule 16 is now dead in the Fifth Circuit"*.

The Rules, themselves, leave no such doubt. Rule 16 provides that in fog, after stopping her engines, the vessel shall "then navigate with caution until danger of collision is over". The latter is defined, 33 USCA 201:

> "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

When the bearing remains dead ahead, without any change whatever, there can be no doubt, in anyone's mind, as to the very obvious risk (indeed certainty) of collision.

The "ascertainment" required by the Rule cannot be a determination that a vessel is dead ahead and that collision is a certainty. As stated in *Nippon Yusen Kaisha vs. The China Navigation Company, Ltd.*, (1935) A.C. 177, 104 LJP 634, 152 LT 313, 51 TLR 205, 78 SJ 897, 18 Asp. M.C. 533, 50 Ll. L. Rep. 155, P.C.:

> "* * * In order that the position of a vessel may be ascertained by another vessel within the meaning of the regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision. * * *"

This is precisely what the HESS VOYAGER knew.

positively and affirmatively, could not be accomplished, yet she continued to proceed - *at immoderate speed and without stopping her engines* - and thereby made collision inevitable.

III.

Conclusion.

Hess would convey to the Court the thought that a tanker in ballast is an inert object, apart from the fact that the HESS VOYAGER represented a mass of more than 27,000 tons moving at a speed of 760 feet per minute. If this were not sufficiently devastating when presented in a collision situation, we need only point out that tankers in ballast have been held to be "as potentially dangerous as a live bomb", *ELVI II-MISSION SAN FRANCISCO*, 183 F. Supp. 129, 1961 AMC 1887 (D.C.,Del.).

The issues presented here are entirely basic, whether or not a large tanker can proceed, with impunity, in a dense fog at a speed of 7½ knots with knowledge that another vessel lies dead ahead. If, under any circumstances, navigation of this character is permitted by the Rules and by the decisions of the courts, the purpose both of the Rules and of the courts has been defeated.

The Fifth Circuit, standing seven judges for affirmance and seven judges for reversal, plainly requires guidance, navigators faced with the conflict between the Fifth Circuit and the Second Circuit equally require guidance. This is the only forum from which recourse may be had and it is essential that this

Court act to remove the doubts created by this most unfortunate decision.

Respectfully submitted,

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Certificate.

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing reply brief on respondents' counsel of record, T. K. Jackson, Esq., by mailing a copy thereof, postage prepaid, to him at his office at Mobile, Alabama, on this . . . . day of August, 1970.

_____

BENJAMIN W. YANCEY.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION,
Respondent.

RESPONDENT'S REPLY BRIEF TO REPLY BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Y IT PLEASE THE COURT:

1. Petitioner's Opening Statements Answered

Petitioner has filed a brief in reply to Respond- s reply to Petitioner's application for certiorari. s brief is in reply to Petitioner's reply. Nothing or different has been added by Petitioner's reply; identical propositions were raised and argued in District Court, in the Court of Appeals at the first ring, in the Court of Appeals at the en banc re- ring and in the Petition for Certiorari.

Petitioner again points to the language used by Judge Brown in his dissenting opinion to the effect that "Rule 16 is dead in the Fifth Circuit". That is not the case. The law in the Fifth Circuit is the same as it has always been. Before Judge Brown took the bench, the Fifth Circuit specifically held that in circumstances nearly identical to those here involved, Judge Brown's so-called "mandatory imperatives" of Article 16 should not be mechanically and blindly applied in every instance. The facts in the case of *The Standella*, 108 F. 2d 619 (5th Cir. 1939) are remarkably similar to the facts in this case, i.e. the collision occurred in fog with visibility limited to 300 feet, the collision occurred in the Houston-Galveston Ship Channel which had a bottom width of 400 feet, a surface width of 450 feet, a depth of 34 feet, the depth of the water outside the channel was only six feet, the vessels were meeting head to head and the collision occurred on the east side of the channel. The Court rejected the argument of Judge Brown, who, at that time was an advocate for the appellant, that the requirement to stop engines must be complied with, regardless of the attending circumstances. Said the Court:

> "From all the evidence it clearly appears that the collision occurred on the east side of the channel; that the M V Standella was negligently navigating on her port side of the channel; and that had she kept to the west (her starboard) side the collision would not have occurred.
>
> The M V Standella was guilty of a most serious statutory fault when she navigated on the

port side of the fairway or mid-channel. Section 210, 33 U.S.C.A., provides: 'Steam vessel in narrow channel. Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.' This is a cardinal rule of navigation and applies as well in fog as in clear weather. The most ignorant navigator will be presumed to know this simple and wise requirement. The Yarmouth, D.C., 100 F. 667; The Newport News, 4 Cir., 105 F. 389, 393.

The M/V Standella claims fault against the Andrew for failing to stop her engine and cites Article 16, 33, U.S.C.A: Sec. 192, which provides: 'Speed in fog, etc. * * * A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'

The evidence is in sharp conflict as to whether or not the M/V Standella was sounding a fog signal prior to the collision. It is without dispute that the Andrew failed to stop or reverse her engine, and that at the time of the disaster she was moving at a speed of about two or two and one-half miles per hour. It is clearly shown, however, that the failure of the Andrew to stop or reverse her engine did not cause the acci-

> dent. Her failure to stop in no wise contributed to the collision. The M/V Standella was moving out to sea on the wrong side of the channel. Had the Andrew stopped her engine she would have been in the path of the oncoming M/V Standella and the collision would have in all probability been more serious than it was. The liability for damages is upon the ship or ships whose fault caused the injury, and where, as here, the fault of one vessel could have had nothing to do with the collision that fault may be dismissed from consideration."

Petitioner's version of the factual events leading to the collision were unacceptable to the trial court and have twice since been denied by the Court of Appeals. Nevertheless, Petitioner continues to re-argue the facts and we again respond to the argument.

The trial court and the majority opinion of the Court of Appeals both held that under the existing circumstances the Voyager's speed was moderate; that the stopping of engines was not required by the rule because the position of the Charles Lykes was known and further, that the stopping of the Voyager's engines would probably have thrown her out of control. We think the circumstances fully justified these findings and conclusions. In addition to these findings and conclusions, the Court specifically found that "The Charles Lykes would have collided with her (the Voyager) even if she had been dead in the water".

On the contrary, it is equally clear that the stopping of engines in the Mobile Ship Channel (in reality, a

canal), just as in the case of a further reduction in speed, would in all probability have resulted in a more serious collision. To hold otherwise would be tantamount to condemning the pilot of the Hess Voyager for doing that which greatly diminished the consequences of an otherwise inescapable collision and such an interpretation of the rule would have an effect exactly the opposite of that intended to be accomplished by the enactment of the Inland Rules. See the *Gertrude Parker*, 178 F.2d 259 (1st Cir. 1949).

2. There is No Conflict Between the Case at Bar and the Goldshell-White Plains

Petitioner reiterates its previous claim of conflict between the decision here and that of the *Goldshell-White Plains*, 224 F. 2d 86, 1955 AMC 1438 but now admits that the collision in the Goldshell-White Plains did not take place in a narrow channel. Petitioner's claim that "it cannot be urged that an *immoderate speed* is made acceptable by the narrowness of the waterway" is completely irrelevant. First of all, both courts have found that the Hess Voyager's speed *was moderate*; secondly, both courts have established that the speed or movement through the water of the Hess Voyager did not and could not have in anywise contributed to the collision.

3. There is No Conflict Between the Case at Bar and Burgan-Bergechief

Petitioner continues to insist that there is a conflict between the decision in the case at bar and that of the Second Circuit decision in the case of the *Burgan-*

Bergechief, 274 F. 2d 469 AMC 1380. A comparison of the two cases will show that the factual situations were entirely different. Petitioner claims that the Burgan-Bergechief stands for the proposition that a radar observation does not constitute sufficient ascertainment of position under Article 16 and that the decision of the case at bar holds to the contrary. The essential factual differences in the two cases are as follows:

1. In the case at bar, the collision occurred in a very narrow, dredged channel in the inland waters of Mobile Bay; in the Burgan-Bergechief, the collision occurred in the open sea off the Coast of Maine.

2. In the instant case the position of the Charles Lykes was not only precisely fixed by radar but was acknowledged and confirmed by radio communications between the two vessels; in the Burgan-Bergechief the radar observation was not a continuous one, did not *precisely* fix the position of the observed vessel and was not acknowledged and confirmed by other means.

3. In the Burgan-Bergechief the vessels were not operating under the mandate of Article 25 of the Inland Rules.

It is submitted that Judge Medina's well-reasoned opinion in the Burgan-Bergechief does not even to the slightest degree conflict with the decision in the case at bar.

CONCLUSION

In summary, it is submitted that the Hess Voyager took the most prudent course available (and the only logical maneuver possible) by running completely out of the line buoys so as to expose as little of itself as possible to the on-coming Charles Lykes. It is apparent that the collision was indeed foredoomed and inevitable from the time the Charles Lykes made the turn into the Upper Reach of Mobile Ship Channel. The maneuvers of the Hess Voyager did not increase the risk of collision but on the contrary, prevented a much more serious casualty.

The long and short of appellant's attack on the Hess Voyager's speed is met head on by the lower courts finding that "it is apparent from all the evidence that the Hess Voyager was aground at the moment of collision and that the Charles Lykes would have collided with her even if she had been dead in the water."

We submit that the factual findings regarding proximate cause and negligence by the trial court and the Court of Appeals are overwhelmingly supported by the evidence and that the "circumstances" of this case justify the actions of the Hess Voyager under Article 16 or Article 27 or any of the other Rules of the Road.

Respectfully submitted,

ARMBRECHT, JACKSON & DeMOUY

By _____
THEODORE K. JACKSON

By _____
RAE M. CROWE

CERTIFICATE OF SERVICE

I Theodore K. Jackson, a member of the bar of thi Court, hereby certify that three copies of the abov and foregoing brief have been served on Petitioner' Counsel of Record, Benjamin W. Yancey, Esquire, b depositing same in the United States mail, postage pre paid, addressed to him at his office in New Orleans Louisiana on this _____ day of _____, 197

THEODORE K. JACKSON

Supreme Court of the United States

October Term, 1970

FILED
NOV 5 1970
E. ROBERT SEAVER, CLERK

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner

versus

HESS SHIPPING CORPORATION and the ST HESS VOYAGER, in rem,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner

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Respondents

PETITION FOR REHEARING

Petitioner respectfully moves this Honorable Court for an order vacating its denial of the petition for writ of certiorari (Mr. Justice Douglas and Mr. Justice Stewart dissenting), entered on October 12, 1970, and granting the petition. As grounds for this motion, petitioner states the following:

I.

The dire concern expressed by the United States Navy and the United States Coast Guard for this problem, as reflected in the article, "Gargantuan Tankers: Privileged or Burdened?", published in the September, 1970 issue of the U. S. Naval Institute Proceedings by Captain Edward F. Oliver of the United States Coast Guard, necessitates action by this Court. We are appending a copy of that article to this petition.

The issues raised by this petition and by the evenly divided decision of the United States Court of Appeals for the Fifth Circuit, *en banc*, are of the greatest urgency and failure to vacate and reverse the decision below inevitably fosters the prospect of a casualty of catastrophic proportions. As stated by Chief Judge Brown in his dissent below:

> "Considering the size of this vessel, one of the contemporary huge tankers of ever increasing size, to allow such speed, which does not even begin to pay even a deferential bow toward Rule 16, the Court's action is more than to write out Rule 16. It is to give judicial license to bigness, as though the ungainly, awkward nature of these floating boxes relieves them of compliance with any part of the rules except the qualifiers of 'special circumstances', 'existing circumstances', and the like. And, since on this Court's analysis S/T Hess Voyager could never safely navigate in channels or harbors at a speed less than 6 knots, it means that for her life, she need not pay heed to Rule 16 and its demand for moderate speed which, until today, has always meant capacity to stop in half the distance of visibility * * *."[1]

The immediacy of the threat and its importance to safety of navigation and pollution control is fully developed by Captain Oliver, who points out:

> "Following the *Torrey Canyon* debacle, the world began to understand that the potential damage from a collision or stranding of a multimillion-barrel oil tanker was not acceptable. The Santa Barbara Channel disaster, for example, where 241,000 gallons (7,650 barrels) escaped from a broken casing, would be insignificant compared to a similar accident involving a tanker that could carry 3,000,000 barrels."[2]

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[1] 417 F. (2d) 346, 352.

[2] "Gargantuan Tankers: Privileged or Burdened?", U. S. Naval Institute Proceedings, September, 1970, p. 40, appended hereto.

The HESS VOYAGER has a gross tonnage of 27,015 tons as compared to a 10,000 gross ton T-2 tanker of World War II vintage. Her deadweight tonnage would be approximately 44,000 tons, the standard used in the vessel descriptions in the article by Captain Oliver. This converts to a capacity of approximately 230,000 barrels and a casualty involving a vessel of this size in an area such as the Mobile Bay Ship Channel can be compared readily to the 7,630 barrel discharge which caused the Santa Barbara disaster.

The Naval Institute article is directed toward obtaining inter-governmental regulation of such tankers to permit safety of navigation at sea, on international waters. It is inconceivable that while such efforts are being undertaken to avoid the danger of oil discharges on the open sea, our courts are granting free license to the plainly hazardous navigation of such vessels in our inland waters with its attendant risk of disaster. As concluded by Captain Oliver:

> "... In the final analysis, the intelligent control of speed in congested waters and low visibility is the only sound policy, and that will be ineffective unless sufficient astern power is built into the monster tankers."[1]

---

[1] *Id.*, p. 44. As the article states, p. 41: "The extreme draft of the monster tankers has one compensating feature. Because of the limited maneuvering capabilities of these ships and the distance required for them to stop, their draft precludes navigation in congested and restricted inland waters. Since collision statistics show that only 9% of collisions occur in open waters, this factor may indicate an excellent potential safety record."

The HESS VOYAGER falls within the most dangerous category of all, a "mini-monster" with a draft enabling her to enter our ports combined with size and handling characteristics which preclude her safe operation.

The Fifth Circuit has answered the question posed by Captain Oliver because, under its decision, a gargantuan tanker plainly is a privileged vessel, is free to operate in the inland waters of the United States in a manifestly dangerous manner and is fully exempt from being held even partially at fault either because of its improper navigation or its improper construction.

We submit that this is a question of such importance that this Court must recognize the very unique situation applying here under which the Fifth Circuit, being evenly divided, *en banc*, has been unable to resolve, properly, this basic and essential problem, and should grant a writ of certiorari, reversing the decision below.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

BENJAMIN W. YANCEY

CERTIFICATE OF SERVICE

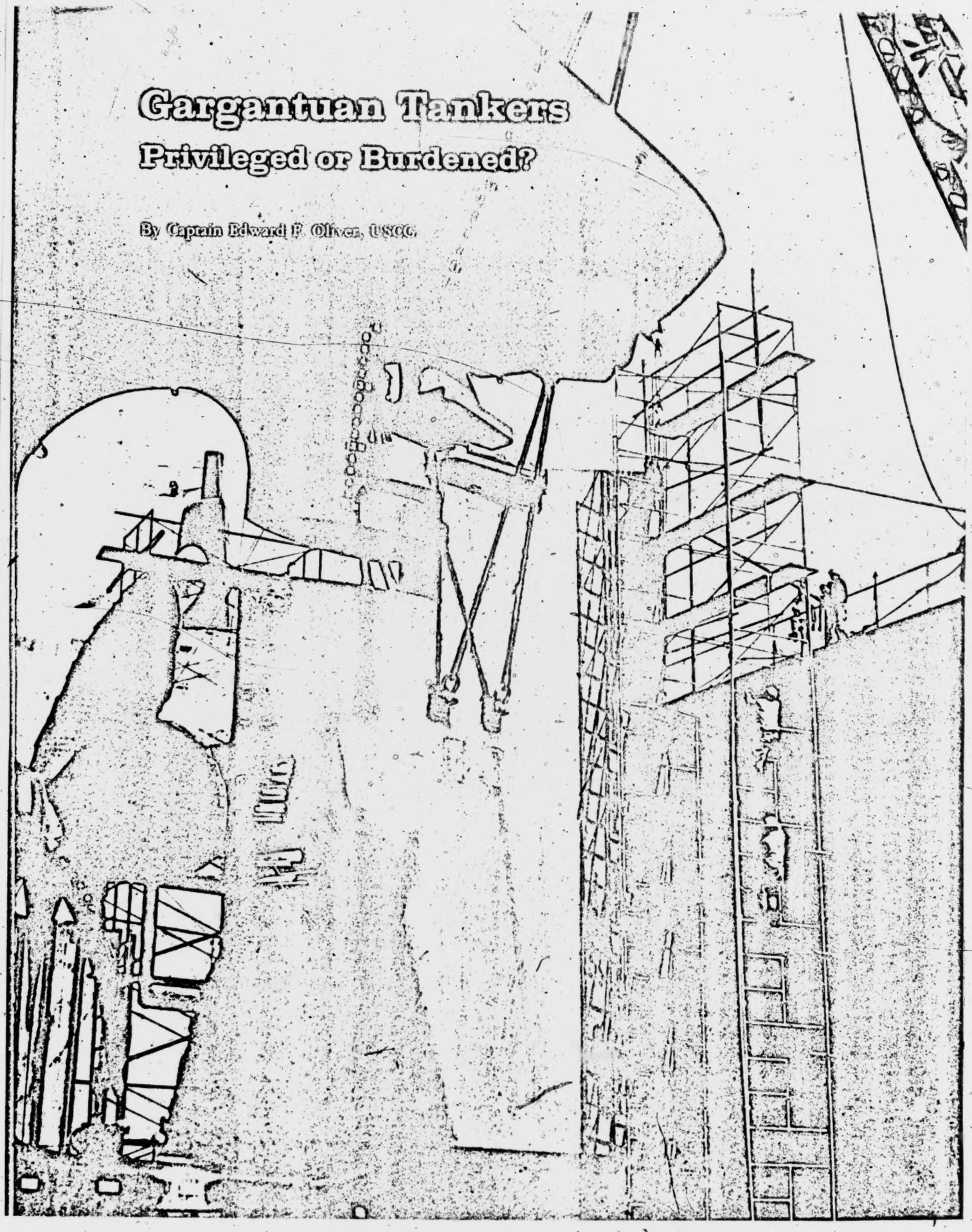
I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing petition for rehearing on respondents' counsel of record, T. K. Jackson, Esq., by mailing a copy thereof, postage prepaid, to him at his office at Mobile, Alabama, on this ____ day of November, 1970.

BENJAMIN W. YANCEY

Gargantuan Tankers

Privileged or Burdened?

By Captain Edward F. Oliver, USCG



The tragic breakup of the *Torrey Canyon* on the jagged rocks of Seven Sisters Reef on 18 March 1967, focused the attention of the world for the first time on the immense size of modern tankers. Today, the 119,000-ton *Torrey Canyon* seems almost small.

Following the *Torrey Canyon* debacle, the world began to understand that the potential damage from a collision or stranding of a multimillion-barrel oil tanker was not acceptable. The Santa Barbara Channel disaster, for example, where 241,000 gallons (7,650 barrels) escaped from a broken casing, would be insignificant compared to a similar accident involving a tanker that could carry 3,000,000 barrels.

Only by international action can such a situation be met effectively. The international character of much of today's shipping is well illustrated by the *Torrey Canyon* herself. Built in Japan, she was owned in Bermuda, registered in Liberia, sailed under an Italian master and crew, was on charter to a British Corporation, and was contracted for salvage to a Dutch company.

Since 1955, the title "world's largest tanker" has been claimed for eight different ships, one holding the honor for only seven days. The following list illustrates the rapid growth of tankers within the past few years:

Name	*Tons*	*Built*	*Launched*
Sinclair Petrolore	56,089	Japan	1956
Universe Leader	85,515	Japan	1957
Universe Apollo	104,520	Japan	1959
Manhattan	108,590	USA	1962
Nissho Maru	130,250	Japan	1962
Tokyo Maru	130,250	Japan	1966
Idemitsu Maru	206,000	Japan	1966
Universe Ireland	326,000	Japan	1968

The title of "largest ship in the world" is now shared by the Bantry Bay class tankers, six sister ships, all 326,000-ton behemoths. The *Universe Ireland*, first to be launched, was built at a cost of $20,000,000 at the Ishikawajima-Harima Heavy Industries Shipyard in Yokohama and was launched in March 1968. The six gargantuan vessels, all owned by National Bulk Carriers and under long-term charter to Gulf Oil Corporation, can each carry 2,513,588 barrels of oil. They are 1,135 feet long.

The *Universe Ireland* and her sisters will not share the title of the world's largest ships for long. There are plans for a 1,000,000-ton tanker on the drawing boards. She will measure approximately 2,000 feet in length, will have a beam of 300 feet, and a draft of 100 feet. Today, under construction, or on order, are 58 100,000-tonners, 191 200,000-tonners, 11 300,000-tonners, and one ship of over 400,000 tons.

The world trend toward giant tankers was accelerated by uncertainties over Suez. Europe, whose oil needs have tripled since 1956, imports nearly all of the oil it uses, and more than 50% of these imports come from the Middle East.

The gargantuan tanker's huge capacity makes it economical for such a ship to bypass the blocked Suez and plow through 11,000 miles of ocean around Cape of Good Hope from the Middle East to Europe and the Americas. The transportation costs run to 40 cents per barrel in a 200,000-ton ship compared with 52 cents in a 70,000-tonner. Each of these leviathans can save a company $1,000,000 a year in shipping costs.

The biggest single restricting factor in tanker development has been, and will continue to be, draft, which until recently was governed mainly by port and approach channel considerations. However, because of the ever-growing size of the tankers and the widening number of places they serve, the limiting depth of narrow ocean passages, such as the Straits of Dover and Malacca, now must be taken into consideration.

As an example of how draft has increased, a World War II T-2 tanker of 17,000 tons, with a length of 523 feet, has a draft of about 30 feet. A 200,000-tonner with the same proportions draws 60 feet.

Navigation of the Panama and Suez Canals is not possible by ships larger than 80,000 tons owing to the channel depths of 38 feet and 38 feet 6 inches, respectively. Prior to the Arab-Israeli war, however, Egyptian authorities had announced plans to deepen the Suez to 60 feet by 1975 to accommodate 200,000-tonners.

There are only 20 ports in the world—and only one of them, Long Beach, California, is in the United States—that can accommodate the gargantuan tankers' extreme draft. The other ports are Bantry Bay, Ireland; Finnart and Milford Haven in Great Britain; Rotterdam, Netherlands; La Skhirra, Tunisia; Port de Bouc, France; Haifa, Israel; Mena Al-Ahmadi and Kharg Island, the Persian Gulf; Marsa el Brega, Libya; Las Palmas, Africa; Dumai, Sungai, and Pakning, Indonesia; and Chiba, Tokuyama, Shimotsu, Negishi, and Iwakuni, Japan.

Because of the limited number of accessible ports, the emphasis now is on the development of complete transportation systems, including deepwater, offshore loading and unloading platforms. This, in turn, will mean that most of these huge bulk carriers will never come to a dock during their entire commercial career, except for drydocking.

The first of these transshipping terminals is Bantry

The Idemitsu Maru, *on the preceding page, with a rudder the size of a badminton court, was the largest ship in the world in 1966. Today, she is the seventh largest and, before the 1970s are out, she may not rank in the top 25.*

***While a** 17,000-ton T-2 tanker can stop within 0.5 mile in 5 minutes, the stopping distance for the 206,000-ton* Idemitsu Maru *is approximately 2.5 miles and takes 21 minutes.*

Bay Terminal, on Whiddy Island, Eire. The dock there will accommodate a 100,000-tonner and a 300,000-tonner simultaneously.

The U. S. Army Engineers studied the possibility of deepening the Delaware Bay to 50 feet as far as Philadelphia so that giant tankers could be handled, but found that the cost was prohibitive. Sinclair, Cities Service, and Gulf oil companies have announced their intention to build jointly a deepwater terminal inside the entrance to Delaware Bay. Vessels, up to 200,000 tons will discharge all or part of their cargoes at the terminal and either depart seaward in ballast, or continue up river at reduced draft to discharge the balance of the cargo.

The extreme draft of the monster tankers has one compensating feature. Because of the limited maneuvering capabilities of these ships and the distance required for them to stop, their draft precludes navigation in congested and restricted inland waters. Since collision statistics show that only 9% of collisions occur in open waters, this factor may indicate an excellent potential safety record.

The most important factor in connection with collision and stranding—the two most dreaded casualties that can occur to a ship—is the "crash stop" ability. Unfortunately, the ability of the mammoth tankers to come to a "crash stop," as compared with smaller vessels, has decreased as their size has increased.

The momentum and inertia generated by a 326,000-ton giant moving through the water have never been duplicated before and seem almost beyond comprehension. Although there has been an enormous increase in the size of the tankers, their speed has remained fairly constant—15 to 17 knots—the same as that of T-2 tankers. Since the energy to be absorbed in stopping a ship is directly proportional to her displacement, the distance and time required to bring one to a "crash stop" from full ahead has increased tremendously.

While a T-2 tanker of 17,000 tons can come to a "crash stop" within 0.5 mile in 5 minutes, the straight line stopping distance for the 200,000-ton *Idemitsu Maru* is approximately 2.5 miles (10 to 15 ship lengths) and takes 21 minutes. By extrapolation for the 400,000-tonner on order, the straight-line stopping distance for a "crash stop" would be four to five miles, and would take approximately 30 minutes. During this period of backing full, the ship's master is unable to steer her or regulate the speed.

If the engines are not put "full astern" but on "stop," it takes up to one hour for the *Universe Ireland* to run her way off and come to a stop. This means that the mariners who will navigate these ships must exercise a much higher degree of vigilance, and be able to project themselves ahead mentally in time and distance in order to anticipate the next maneuver.

One of the important ramifications of the inability



Having completed his tests of piping, a Japanese shipyard inspector must make a 105-foot-high climb in order to get out of the center cargo tank of the Universe Ireland.

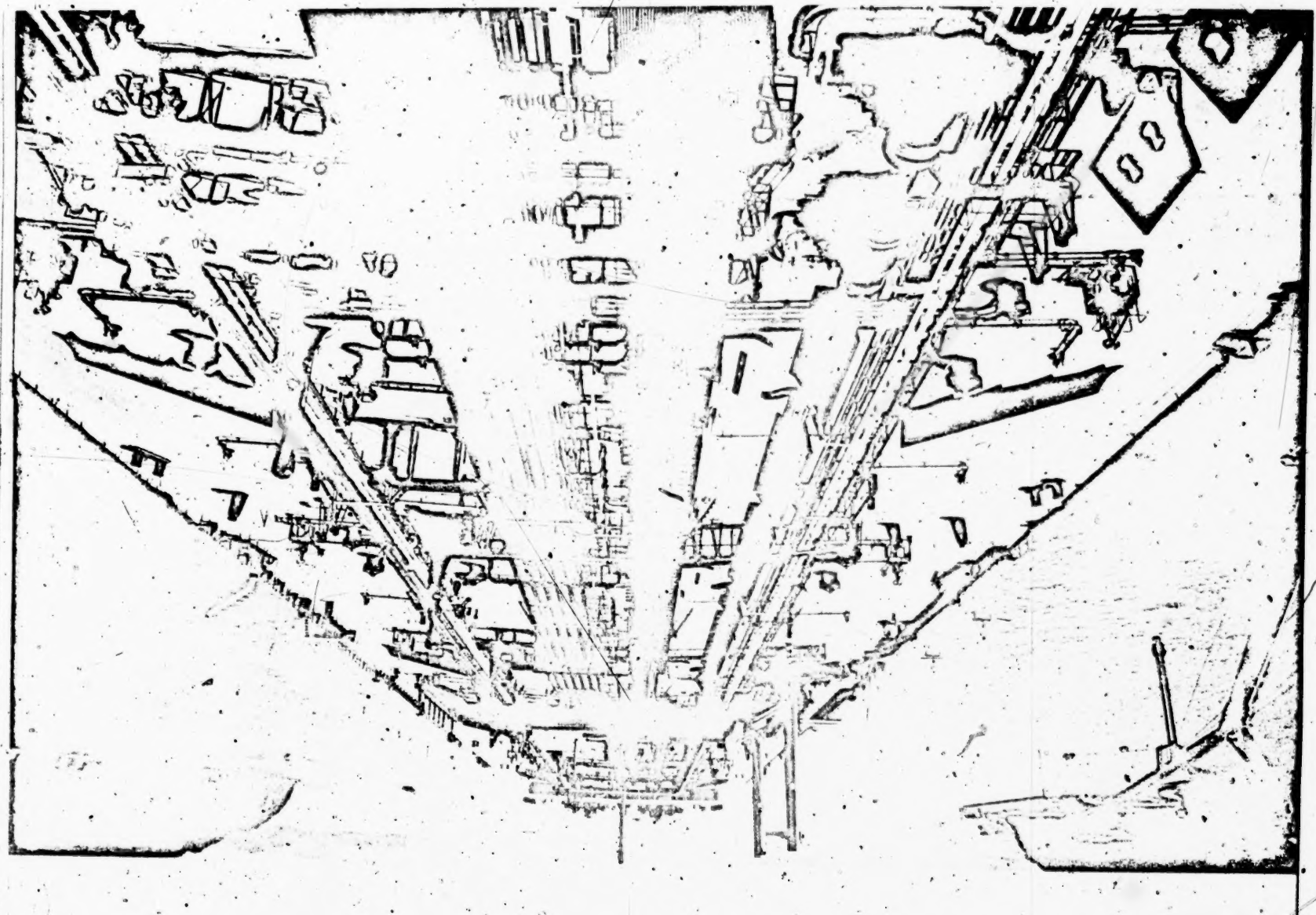
to stop within a reasonably short distance is that the monster tankers cannot operate today within the restrictions established by the International Rules of the Road to prevent collisions.

Rule 16, for example, states: *Every vessel, or seaplane when taxiing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.* Admiralty courts have long held that "moderate speed" is the speed at which a vessel can stop within one half the distance of visibility. Since a gargantuan tanker cannot be maneuvered readily when moving at less than 5 knots, and cannot be stopped in less than two to three miles, the inability of such ships to comply with this Rule becomes apparent. To comply would mean that the tanker leviathans would have to come to a stop whenever the visibility decreased to less than five miles.

Rule 25, or the *Narrow Channel Rule*, presents another problem for giant tankers. Part (c) of the Rule states: *In a narrow channel a powerdriven vessel of less than 65 feet in length shall not hamper the safe passage of a vessel, which can navigate only inside such channel.* This means that a vessel over 65 feet—for example, a 70-foot fishing vessel—can require a monster tanker to give way in a crossing situation, according to the letter of the law, if the fishing vessel is the privileged vessel. In one part of the Malacca and Singapore Straits channels, where the water, deep enough for giant tankers is only 1.5 miles wide, such a rule presents serious potential hazards.

Although no solution has been proposed for the impasse between the "moderate speed" rule and the inability of monster tankers to comply therewith, the United Nation's Inter-Governmental Maritime Consultive Organization (IMCO) adopted in November 1968 an interim resolution which will have the effect of a Rule of the Road. The resolution prescribes that monster tankers, when navigating in narrow channels, shall show red lights similar to those shown by a vessel that is not under command. The resolution prescribes that "three red lights in a vertical line . . . shall be carried where they can best be seen and visible around the horizon at a distance of at least two miles. By day such a vessel may carry, where it can best be seen, a black cylinder of not less than two feet in diameter and a length of not less than 3.5 feet."

Since this resolution restricts itself to application only in narrow channels, how will a super tanker indicate her size when operating in other than narrow channels?



flaps similar to aerodynamic flaps on jet airplanes. The flaps extend out of the underwater body and, when not in use, retract to form a part of the ship form.

Even so, the effectiveness of the various braking devices seems to be marginal and of no appreciable effect in reducing from full speed unless used in conjunction with the main engine. In the final analysis the intelligent control of speed in congested waters and in low visibility is the only sound policy, and that will be ineffective unless sufficient astern power is built into the monster tankers.

Another area of deficiency in the Rules of the Road as they apply to the giant tankers lies with the rules which prescribe lights for vessels underway and at anchor. Rule 2 prescribes that, when underway, a white light shall be carried in the forepart of the vessel, and a second white light shall be carried abaft the forward light. The after light shall be carried at least 15 feet higher than the forward light. Owing to the design of the monster tankers, the after light is carried on the radar mast above the after superstructure. This means that there may be a distance of from 600 to 900 feet horizontally between the two white lights. It is not surprising, then, that observers in other, smaller vessels can be misled into thinking that there are two vessels involved, instead of a single ship 1,000 feet in length. An accident of this nature occurred recently in Tokyo Bay between the *Idemitsu Daphne* and a small inter-island vessel.

It has been suggested by the U. S. representative to IMCO that the adoption of a rule similar to Rule 9 of the U. S. Great Lakes Rules would be a realistic solution to the problem. The long ore carriers are required to show, when at anchor, a white light every 100 feet along the main deck. This rule was adopted on the Great Lakes in 1895, and since that time, there have been no collisions caused by an ore carrier being mistaken for two vessels.

While waiting for the International Rules of the Road to be changed to provide for 20th century ships, some masters are following the practice of commanding officers of the U. S. Coast Guard sailing barque *Eagle*, as well as many yachtsmen. When underway at night in congested waters, white flood lights are reflected off the billowing sails of the *Eagle* so that other traffic will not mistake her for a steamer. Captain Hiramatsu, the master of the Japanese gargantuan *Nisho Maru*, stated recently that when navigating in the Inland Sea of Japan, he illuminates the unlighted mid-body of his 1,000 foot vessel with a searchlight, even though such a light is not specifically provided for by the Rules of the Road, so that nearby traffic will be aware of the ship's length.

Essential, too, is the need for these huge ships to be towed so as to keep them clear of any shoal area where a grounding might occur, and separate from traffic moving on an opposite course. The only way this can be done is by the use of sea lanes. An internationally accepted regime of mandatory sea lanes across the oceans is urgently needed.

Within the past few years, the Coast Guard has established recommended sea lane systems in the approaches to New York, Delaware Bay, and San Francisco, and in the Santa Barbara Channel. Sea lane systems have also been established in the English Channel, portions of the North Sea, Baltic Sea, Strait of Gibraltar, and off the Cape of Good Hope. Since the establishment of sea lanes in the Dover Strait, collision statistics have been halved in that area.

IMCO has recognized the immediate need for separation of traffic and, in March 1969 issued a resolution concerning ship routing. The resolution recommended that all nations encourage their vessels to use sea lanes where established. Although the intent was commendable, there is serious doubt as to whether the measure goes far enough, for the resolution does not make the use of sea lanes mandatory. Whether ocean navigation can accept such an important safety concept on a vol-

question until the next disaster.

Japan, with five ports open to tankers with deep draft, has the most offshore traffic by monster tankers. Yet Japan still has not established sea lanes for her busy ports.

Sea lanes are particularly needed in the Straits of Malacca and Singapore, between the Indian and Pacific Oceans. A constant procession of tankers ply these straits on the run between the Persian Gulf and Japan. The water is deep enough for 200,000-tonners (fortot draft), but, owing to the narrow navigable width of the deep sections of the channels, large tankers must use extreme caution in traversing the area.

Traffic conditions in the Main Strait (the west part of Singapore Straits) are very heavy at times. A ship must give way to another, according to International Rules of the Road, regardless of her size. And during the fishing season, fishing boats, at times, completely obstruct the Main Strait, leaving no clear passage, either by day or by night.

Since the gargantuan tankers, with their limited maneuvering ability, must be able to negotiate overtaking and crossing situations with smaller vessels, every aid to safe navigation that is available should be used. One such aid, which is still not being used to advantage and for which an international requirement is needed, is the bridge-to-bridge telephone.

For 27 minutes prior to the *Andrea Doria-Stockholm* collision in 1957, the two vessels had been in sight of each other, yet the deck officers on the respective bridges could not communicate with each other because there were no radio-telephones installed. At the same time, passengers on both ships, a few feet above the bridges, were using radiotelephones for personal calls to the shore. A Congressional committee investigating that accident recommended that a bridge-to-bridge radiotelephone communication system be adopted on

"The world's seaborne trade has nearly doubled in the last decade. In 1965, there were 43,000 ships of 100 gross tons or greater, and by the year 2000, this number may well be 88,000. This figure could include as many as 2,000 monster tankers.

It has now been three years since the *Torrey Canyon* disaster, and the lack of definitive international requirements for mandatory use of sea lanes, bridge-to-bridge communication, and practical changes to the Rules of the Road poses a stark question. Is the international maritime legal machinery too cumbersome to cope with the changing needs of 20th century ocean traffic? And that question prompts another, of even graver significance. Will it take another, greater maritime disaster to awaken the world to the urgent need for realistic international regulation of ocean navigation?